Supreme Court, U.S.
FILED

97-128 JUL 21 1997

OFFICE OF THE CLERK

No. _____

In The Supreme Court Of The United States

OCTOBER TERM 1997

ROD McKINNEY; and CF AIR FREIGHT EMPLOYEES,

Petitioners,

v.

EMERY AIR FREIGHT CORPORATION, d/b/a EMERY WORLDWIDE, A CF COMPANY; LOCAL 85, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO; WESTERN CONFERENCE OF TEAMSTERS; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Christopher W. Katzenbach
KATZENBACH AND KHTIKIAN
Attorneys at Law
1714 Stockton Street, Suite 300
San Francisco, California 94133-2930
(415) 834-1778

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

97-PP

QUESTION PRESENTED

Have the lower courts failed to give sufficient weight to the policy of exhaustion of the grievance-and-arbitration process by applying the "knew or should have known" test that the statute of limitations starts to run when the employee knows or should know that the union has violated its fair representation duty, even if this is before the grievance-and-arbitration process is completed, rather than applying the "date of exhaustion" test that the statute of limitations does not begin until a final grievance or arbitration decision is rendered which formally terminates the grievance-and-arbitration proceeding?

LIST OF PARTIES

The parties to the proceedings below are:

1. Rod McKinney.

2. CF Air Freight Employees (an organization of former employees of CF Air Freight).

3. Emery Air Freight Corporation d/b/a Emery Worldwise, a CF Company.

In addition, the following parties were parties to the proceedings in the district court:

4. Local 85, International Brotherhood of Teamsters, AFL-CIO.

5. Western Conference of Teamsters.

6. International Brotherhood of Teamsters, AFL-CIO.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. THE LOWER COURTS HAVE FAILED TO GIVE SUFFICIENT WEIGHT TO THE POLICY OF EXHAUSTION OF THE GRIEVANCE-AND-ARBITRATION PROCESS BY APPLYING THE "KNEW OR SHOULD HAVE KNOWN" TEST THAT THE STATUTE OF LIMITATIONS STARTS TO RUN WHEN THE EMPLOYEE KNOWS OR SHOULD KNOW THAT THE UNION HAS VIOLATED ITS FAIR REPRESENTATION DUTY, EVEN IF THIS IS BEFORE THE GRIEVANCE-AND-ARBITRATION PROCESS IS COMPLETED, RATHER THAN APPLYING THE "DATE OF EXHAUSTION" TEST THAT THE STATUTE OF LIMITATIONS DOES NOT BEGIN UNTIL A FINAL GRIEVANCE OR ARBITRATION

DECISION IS RENDERED WHICH FORMALLY TERMINATES THE GRIEVANCE-AND-ARBITRATION PROCEEDING. 10

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Buttry v. General Signal Corp., 68 F.3d 1488 (2d Cir. 1995) 14, 15, 16, 19, 20

Childs v. Pennsylvania Fed'n Bhd. of Maintenance of Way Employees, 831 F.2d 429 (3d Cir. 1987) . . 11, 12, 13, 16, 18

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) 10, 17

Dowty v. Pioneer Rural Electric Cooperative, 770 F.2d 52 (6 Cir. 1985) cert. denied 474 U.S. 1021 13, 14

Edwards v. International Union, United Plant Guard Workers, 46 F.3d 1047 (10th Cir. 1995) . . 13, 14

Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers, 746 F.2d 1316 (7th Cir.1984) . 13, 14

Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986) 13, 14

Ghartey v. St. John's Queens Hosp., 869 F.2d 160 (2d Cir. 1989) 13, 14

Hayes v. Reynolds Metals Co., 769 F.2d 1520 (11th Cir. 1985) 13

International Association of Machinists and Aerospace Workers v. Tennessee Valley Authority, 108 F.3d 658 (6th Cir. 1997) 13, 14, 16

Kozy v. Wings West Airlines, Inc., 89 F.3d 635 (9th Cir. 1996) 13

Lucas v. Mountain States Tel. & Tel., 909 F.2d 419 (10th Cir. 1990) 13, 14

McKinney, et al. v. Emery Air Freight Corp., 954 F.2d 590 (9th Cir. 1992) 3, 5, 6

Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983) cert. denied 464 U.S. 1070 . 13, 14

Singer v. Flying Tiger Line, Inc., 652 F.2d 1349 (9th Cir. 1981) 19

Vaca v. Sipes, 386 U.S. 171 (1967) 3

Whittle v. Local 651, International Brotherhood of Teamsters, 56 F.3d 487 (3d Cir. 1995) . . . 13, 18

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1337 3

28 U.S.C. § 2101(c) 1

Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. § 160(b)) 2, 10

Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)) 2, 3

Court Rules

U.S.Sup.Ct. Rule 13.1 1

U.S.Sup.Ct. Rule 13.3 1

PETITION FOR WRIT OF CERTIORARI

Rod McKinney and CF Air Freight Employees ("Petitioners") respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 13, 1997.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit filed is not officially published and is reprinted at App. pages 9a-11a, *infra*. Its unofficial citations are 108 F.2d 1385 and 1997 WL 117060. The Order and Judgment of the United States District Court for the Northern District of California is not officially published and is reprinted at App. pages 1a-8a, *infra*. The District Court's opinion is not published. The Order of the Court of Appeals denied rehearing was filed April 21, 1997, is unpublished and is reprinted at App. page 12a, *infra*.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 13, 1997. App. p. 9a. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed. On April 21, 1997, the Ninth Circuit denied the Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. App. p. 12a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S.Sup.Ct. Rule 13.1 and 13.3.

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jursidiction of the parties, without regard to the amount in controvesy or without regard to the citizenship of the parties."

Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. § 160(b)), provides, in material part:

> "*Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person to against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of discharge."

STATEMENT OF THE CASE

This case arises as a suit by Petitioners against their employer and their union. Petitioners alleged that the employer had breached a collective bargaining agreement and the union had breached its duty of fair representation by

mishandling the ensuing grievance-and-arbitration proceedings. This Court established the right of employees to bring such actions to enforce their rights under collective bargaining agreements which contain exclusive grievance-and-arbitration provisions otherwise controlled exclusively by the employer and union in Vaca v. Sipes, 386 U.S. 171 (1967). This type of action is typically referred to as hybrid § 301/fair representation case because it involves both proof of a union's breach of its fair representation duty and breach of the underlying collective bargaining agreement between the union and the employer.

Jurisdiction of the District Court was invoked under section 301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. § 185(a)) for violation of a collective bargaining agreement and under 28 U.S.C. § 1331 and § 1337, as the duty of fair representation arises under federal laws regulating interstate commerce.

This case arises from Petitioners' efforts to obtain damages for breach of the terms of a collective bargaining agreement covering their employment following a corporate merger and reorganization as a result of which Petitioners' work was transferred to other employees and Petitioners lost their contract benefits, seniority and jobs which had been subject to their collective bargaining agreement. See App. pp. 15a, 17a-19a.[1]

---

[1] The background facts are discussed in the Ninth Circuit's earlier decision in this dispute, Case Nos. 90-15600, 90-15613, McKinney, et al. v. Emery Air Freight Corp.

(continued...)

Plaintiffs were employees of CF Air Freight, Inc. ("CF Air Freight" or "CFAF") and covered by a collective bargaining agreement between CF Air Freight and Teamster Local 85 (the "Union"). The collective bargaining agreement at issue in this case had effective dates of April 1, 1988 through March 31, 1991 (the "1988-1991 Agreement"). App. pp. 18a-19a, 25a, 59a.

The Agreement contained provisions protecting Petitioners' contract rights in the event of a corporate merger or reorganization (Article 1, section 3, second paragraph, second sentence) (App. pp. 60a et seq.):

> "In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer shall be liable to the Local Union and to the employees covered for all damages sustained as a result of such failure to require the assumption of the terms of this Agreement until its expiration date, but shall not be liable after the purchaser, the transferee or lessee has agreed to assume the obligations of this Agreement." (Emphasis supplied.)

The 1988-1991 Agreement expressly provides that corporate reorganizations shall not affect liability under the Agreement for damages (Article 1, section 3, second paragraph, last sentence):

---

[1](...continued)
(1992) 954 F.2d 590, reproduced at App. pp. 13a-26a.

> "Corporate reorganizations by the Employer, occurring during the term of this Agreement, shall not relieve the Employer or the reorganized employer of the obligations of this Agreement during its term."

CF Air Freight's parent corporation (Consolidated Freightways, Inc.) acquired Emery Air Freight Corporation in about April 1989. Through subsequent corporate restructuring by Consolidated Freightways, defendant Emery Air Freight Corporation, d/b/a Emery Worldwide, a CF Company ("Emery") was left as the surviving corporate entity. Emery's employees were also represented by the Union. App. pp. 17a-18a.

As a result of this corporate restructuring, the Union and Emery declared the 1988-1991 Agreement with CF Air Freight void. Archie Murrietta, a Teamster official assigned to handle issues arising from the CF-Emery merger, told the plaintiffs that the Agreement was "dead", refused to consider seniority provisions plaintiffs proposed that would have protected their jobs, and told plaintiffs to "get a good lawyer." App. pp. 34a-41a, 43a.

On July 14, 1989, the CFAF employees instituted an action in District Court for declaratory relief that the 1988-1991 Agreement remained valid at least for purposes of a remedy for damages under the contract (McKinney, et al. v. Emery Air Freight Corporation ("McKinney I"), Docket No. C 89 2649 CAL). The District Court concluded that the contract was binding after the merger, but concluded that plaintiffs had not shown a breach of the duty of fair representation to avoid going through the contractual

grievance procedure. Both sides appealed.

The Ninth Circuit reversed (Case Nos. 90-15600, 90-15613, McKinney, et al. v. Emery Air Freight Corp. (1992) 954 F.2d 590). App. pp. 13a-26a. The Ninth Circuit also concluded that the contract existed at some time (App. p. 25a). However, the Ninth Circuit noted the factual dispute between Emery and plaintiffs as to whether the contract was a three-year agreement or only a one-year retroactive agreement, and remanded the case for a hearing before the grievance/arbitration provisions of the Agreement (App. pp. 25a-26a).

Following remand, the District Court ordered the dispute to the grievance procedure provided for in the Agreement (App. pp. 2a-28a).

In the course of setting the dispute for a hearing, the union advised petitioners that would not be plaintiffs' "spokesperson" at the hearing but it would assist them in presenting their own case:

> "In view of the history of the positions taken by the parties at various stages of this proceeding, Local 85 does not believe it appropriate to be the spokesperson at JWAC for Mr. McKinney and the group he represents. A representative of Local 85 will attend the hearing and will take appropriate steps to ensure that Mr. McKinney and/or other members he represents will have a full opportunity to present their case." App. pp. 55a-56a.

On Tuesday, November 2, 1993, the Union notified the plaintiffs that the case would be submitted to a joint grievance panel (the Joint Western Area Committee or "JWAC") at its next meeting (App. pp. 57a-58a). Petitioners attempted to learn when their case was scheduled, but were unable to locate the case on the printed JWAC agenda (App. p. 45a). Petitioners arranged to be informed if their case was added to the agenda on Sunday. Sunday evening, Petitioners learned that the case had not been added to the agenda at the union caucus (App. pp. 45a-46a).

On Monday, November 8, 1993, the first day of the week-long JWAC meetings, the JWAC panel to which Petitioners' case had been assigned met in San Diego, California (App. pp. 30a-31a, 47a). Petitioners not were present. Murrietta was the Chairman of the hearing panel and was present in the closed-session deliberations of the JWAC panel (App. pp. 31a-32a, 46a-48a). The JWAC panel rejected the grievance (App. p. 48a). One of the Petitioners received a telephone call on November 8 informing him that Petitioners had lost (App. p. 46a).

On May 6, 1994, less than six months after the JWAC decision, Petitioners instituted this action for breach of the duty of fair representation, breach of collective bargaining agreement, and other claims (App. pp. 3a-4a).

The District Court granted Respondent's motion for summary judgment on the grounds that the statute of limitations had run. The District Court concluded that statute ran from the date the union declined to be Petitioners' spokesperson at the hearing, rather than from the date of the hearing. The District Court reasoned that, identifying the

starting date for the statute of limitations "requires a more specific identification of what the alleged breach of the duty of fair representation is here" (App. p. 4a). The District Court concluded that "the real claim is that the union declined to represent [Petitioners]" at the hearing and that, therefore, the statute of limitations therefore accrued when Petitioners were told that the union would not be their spokesperson rather than the date of the grievance decision. App. p. 8a.

In an unpublished decision, the Ninth Circuit affirmed the District Court. Like the District Court, the Ninth Circuit held that the statute of limitations in a fair representation case commenced to run from the date the union stated that it would not be Petitioners' spokesperson at the hearing rather than the date of the JWAC grievance/arbitration decision:

> "The district court ruled that this claim was barred by the six-month statute of limitations, because plaintiffs received notice that the union would not represent them more than six months before the complaint was filed in district court. * * * Plaintiffs contend on appeal that the district court erred because when the claim of breach of duty of fair representation involves a grievance or arbitration proceeding the claim does not accrue until the plaintiffs learn the result of the proceeding. The Ninth Circuit authority relied upon by plaintiffs, however, establishes no such bright line rule. See Galindo v. Stoody Co., 793 F.2d 1502, 1509 (9th Cir. 1986) (where union decides not to bring grievance at all, cause of action accrues 'when the employee learns or should have

learned of the union's decision'). Kozy v. Wings West Airlines, 89 F.3d 635 (9th Cir. 1996), is distinguishable because it involved a union's allegedly flawed representation at an arbitration hearing, rather than a failure to represent at all, and because its ruling was based on jurisdictional requirements not present here. The district court correctly concluded this case was most analogous to the Second Circuit's decision in Buttry v. General Signal Corp., 68 F.3d 1488 (2d Cir. 1995), and our circuit law is not inconsistent with that decision. See Galindo, 793 F.2d at 1509." App. pp. 10a-11a

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS HAVE FAILED TO GIVE SUFFICIENT WEIGHT TO THE POLICY OF EXHAUSTION OF THE GRIEVANCE-AND-ARBITRATION PROCESS BY APPLYING THE "KNEW OR SHOULD HAVE KNOWN" TEST THAT THE STATUTE OF LIMITATIONS STARTS TO RUN WHEN THE EMPLOYEE KNOWS OR SHOULD KNOW THAT THE UNION HAS VIOLATED ITS FAIR REPRESENTATION DUTY, EVEN IF THIS IS BEFORE THE GRIEVANCE-AND-ARBITRATION PROCESS IS COMPLETED, RATHER THAN APPLYING THE "DATE OF EXHAUSTION" TEST THAT THE STATUTE OF LIMITATIONS DOES NOT BEGIN UNTIL A FINAL GRIEVANCE OR ARBITRATION DECISION IS RENDERED WHICH FORMALLY TERMINATES THE GRIEVANCE-AND-ARBITRATION PROCEEDING.

In DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), this Court held that the six-month period in section 10(b) of the National Labor Relations Act, which governed the filing of charges with the National Labor Relations Board, should apply as the statute of limitations in hybrid § 301/fair representation cases. DelCostello did not directly address when the claim accrues and starts the statute of limitations running.[2]

---

2 In considering the specific cases before it in (continued...)

The vast majority of fair representation cases involve grievance handling by unions. The Circuits are split on whether the limitations period starts to run when the grievance-and-arbitration process is concluded (the "date of exhaustion" test) or when the employee knows or should know of the facts indicating a breach of the union's duty of fair representation in the handling of the grievance or arbitration, even if that is before any formal decision on the employee's grievance (the "knows or should have known" test).[3]

The Third Circuit in Childs v. Pennsylvania Fed'n Bhd. of Maintenance of Way Employees, 831 F.2d 429, 436 (3d Cir. 1987) decided the leading case concluding that the statute of limitations does not begin to run until the grievance-and-arbitration proceedings are exhausted with the arbitrator's final decision. Childs adopted a "date of exhaustion" test as a bright-line rule because of two policies which underlie hybrid § 301/fair representation cases (id. at 434-435):

---

[2](...continued)
DelCostello this Court stated that the date that the adverse decision was "rendered" would be the date the statute of limitations began to run, subject to further tolling on the particular facts of the cases. See id., 426 U.S. at 165 n. 16, 172).

[3] In labeling these two tests, Petitioners do not suggest that any of the lower courts have used these precise phrases to label the tests they apply. The labels, however, conveniently distinguish the two different tests the lower courts have applied.

> First, it seems inefficient and unwise to compel an employee to sue his union in federal court while the union continues, in good faith, to pursue the employee's claims and attempts to remedy any past breach of its DFR. If the union can indeed remedy the cause of the employee's dissatisfaction, it should be allowed to do so, thus obviating federal judicial involvement. * * * Second, in this case the employee faces a double disincentive to initiating a DFR suit. Not only would such action seem inefficient and premature, but suing the union that is representing him in front of the Board might also jeopardize his chances of winning against the railroad in that administrative forum. Requiring an employee to sue his union as soon as he discovers the union's breach would place the employee in an untenable situation--if he waits to sue the union he may lose the right to do so, but if he sues the union immediately he may antagonize the best possible champion of his cause.

The Third Circuit in Childs, supra at 435-36, considered and rejected a test for accrual based on when the employee "knew or should have known" of the violation of the union's fair representation duty. The Third Circuit concluded that such a test, where a case was proceeding to an arbitration decision, was unworkable. First, it "may be impossible to pinpoint the date an employee should have known further action would be futile." Id. at 436. Second, such a rule "subverts congressional policy" in favor of administrative resolution of labor problems. Id. at 436. Accordingly, because of these policies (id. at 436), Childs created a bright line rule that the fair representation claim did not accrue until the arbitral body rejected the employee's

claim. Id. at 436.

The Third Circuit has reaffirmed Childs. Whittle v. Local 651, International Brotherhood of Teamsters, 56 F.3d 487, 490 (3d Cir. 1995).

The Eleventh Circuit has adopted a similar rule based on the date of exhaustion of the grievance-and-arbitration process. Hayes v. Reynolds Metals Co., 769 F.2d 1520, 1522-23 & n. 3 (11th Cir. 1985). In Hayes, the Eleventh Circuit held that the statute of limitations does not begin to run until "the grievance procedure has been exhausted or otherwise breaks down to the employee's disadvantage. * * * This is, of course, fully consistent with the employee's obligation to make use of the grievance procedure provided by the agreement." Id. at 1522.

The other Circuits, including the Ninth Circuit, have adopted the rule that the fair representation claim accrues when the employee "knows or in the exercise of reasonable diligence should have known or discovered the acts constituting the union's alleged violations." Lucas v. Mountain States Tel. & Tel., 909 F.2d 419, 420 (10th Cir. 1990); accord: Ghartey v. St. John's Queens Hosp., 869 F.2d 160, 163 (2d Cir. 1989); International Association of Machinists and Aerospace Workers v. Tennessee Valley Authority, 108 F.3d 658, 667 (6th Cir. 1997); Dowty v. Pioneer Rural Electric Cooperative, 770 F.2d 52, 57 (6 Cir. 1985) cert. denied 474 U.S. 1021; Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299, 303-304 (7th Cir. 1983) cert. denied 464 U.S. 1070; Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers, 746 F.2d 1316, 1319 (7th Cir. 1984); Kozy v. Wings West Airlines,

Inc., 89 F.3d 635, 640 (9th Cir. 1996); Galindo v. Stoody Co. (9 Cir. 1986) 793 F.2d 1502, 1509 (9th Cir. 1986); Edwards v. International Union, United Plant Guard Workers, 46 F.3d 1047, 1054 (10th Cir. 1995).

In many of these cases using the "know or should have known" test, the other Circuits reached the same result as would have been reached under the "date of exhaustion" test. Ghartey v. St. John's Queens Hosp., supra, 869 F.2d 160, 163-165; Dowty v. Pioneer Rural Electric Cooperative, supra, 770 F.2d at 57; Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers, supra, 746 F.2d at 1319; Galindo v. Stoody Co., supra, 793 F.2d 1509; Lucas v. Mountain States Tel. & Tel., supra, 909 F.2d at 420-21.

However, other cases have reached very different results using the "know or should have known" test rather than the "date of exhaustion" test. See Metz v. Tootsie Roll Industries, Inc., supra, 715 F.2d at 303-304 (no formal decision by union not to process grievance but employee should have realized that union's silence was equivalent of denial of the grievance); International Association of Machinists and Aerospace Workers v. Tennessee Valley Authority, supra, 108 F.3d at 667 (where a group of similar grievance were filed at the same time, statute accrues when union refuses to arbitrate earlier grievances in group because that is when employees know of the basis for their fair representation claim); Buttry v. General Signal Corp., 68 F.3d 1488, 1491-1493 (2d Cir. 1995) (date employees knew of union's opposition to their position rather than date of arbitration decision interpreting the collective bargaining agreement).

The decision below represents the difference in result between the "knew or should have known" test and the "date of exhaustion" test. The Ninth Circuit recognized that the action was brought within six months of the JWAC's decision of November 8, 1993, but more than six months after the Union told Petitioners that it would not be their "spokesperson" at this hearing. The action was clearly timely under the "date of exhaustion" test.

However, applying the "knew or should have known" test, rather than the "date of exhaustion" test, the Ninth Circuit concluded that Petitioners knew of the facts underlying the fair representation claim before the JWAC hearing, and should have brought their claim based on the earlier date of such knowledge, rather than await the outcome of the JWAC hearing (App. pp. 10a-11a)

Buttry v. General Signal Corp., supra, 68 F.3d 1488, upon which the Ninth Circuit relied in the case below, also demonstrates the difference in result between the two tests. In Buttry, two unions (Machinists and Glass Workers) were signatory to identical contractual terms with an employer. One took the dispute to arbitration (Machinists), the other (Glass Workers) refused to file a grievance. The Machinists ultimately prevailed in the arbitration. Based on that result, the employees represented by the Glass Workers instituted an action for breach of the duty of fair representation because of the Glass Workers' refusal to pursue their grievance based on the same facts as the successful Machinists' arbitration.

The employees argued that their claim against the Glass Workers union should not accrue until the arbitrator issued a decision in the Machinists' case on the application of

the common contractual provision to the common facts involving employees represented by both unions (Buttry, supra, 68 F.2d at 1491).

The Second Circuit rejected the employees' argument. The Second Circuit held instead that the fair representation claim accrued under the "knew or should have known" test when the employees knew that the Glass Workers would not file a grievance (Buttry, supra, 68 F.2d at 1492-93). The Second Circuit distinguished the Childs line of cases on the grounds that those cases did not involve a union which was "manifestly opposing, rejecting or abandoning the interests or claims of a member, but rather with a union purporting to fulfill its duty of fair representation throughout the arbitration process" (id. at 1492-93).[4]

The Sixth Circuit, also applying the "knew or should have known" test, has also held fair representation claims accrued before the completion of the grievance-and-arbitration proceedings from which the fair representation claims arose. International Association of Machinists and Aerospace Workers v. Tennessee Valley Authority, supra, 108 F.3d at

---

[4] The fact that two different unions were involved in Buttry is not dispositive. Since the arbitration involved a common contractual provision and its application to a common factual situation, the policy in favor of exhaustion would apply even though a different union was formally pursuing the arbitration. A Federal district court, faced with a fair representation action in this circumstance, would not clearly err in staying its proceedings pending the outcome of such an arbitration.

667. Tennessee Valley Authority involved multiple grievances arising from common or identical facts filed by the Machinists Union (the IAM) who represented the employees. Although the grievances were filed at the same time, decisions on the grievances were made at different times. Id. at 660. The Sixth Circuit concluded that the claim accrued when the Joint Administrative Council ("JAC"), a joint union-employer board (id. at 660), denied the earlier grievances in the series. Applying the "knew or should have known test", the Sixth Circuit held that, because the earlier rejections "of both the merits of the grievances and the requests for arbitration were also based on identical reasoning," the employees and the IAM "should have known as of October 2, 1992, at the latest, that the JAC's position was unequivocal. The statute began to run on that date" notwithstanding the fact that the final grievance of the group had not yet been resolved. Id. at 667.

The "knew or should have known" test undermines the important policy of exhaustion of internal grievance-and-arbitration procedures which is a bedrock principle in this Court's jurisprudence governing the enforcement of collective bargaining agreements. In adopting the "know or should have known" test, the lower courts have failed to focus on the underlying policy which led this Court to establish the duty of fair representation: As a means for employees to avoid the otherwise harsh result of the finality of arbitration where access to arbitration is controlled by the union. DelCostello v. International Bhd. of Teamsters, supra, 462 U.S. at 164. Absent a breach of the union's fair representation duty, the results of a grievance-and-arbitration process is final and binding on the employee.

Since the rationale for the duty of fair representation

arises from the tension between the finality of such procedures and the union's control over the grievance-and-arbitration process, a fair representation claim can only accrue when the grievance-and-arbitration process concludes, either through an arbitration decision or through some action by the union formally terminating the pre-arbitration grievance procedure.

In adopting the "date of exhaustion" test, the Third Circuit in Childs correctly focused on the policy that the internal grievance process should be pursued to conclusion before the union should be accused of failing in its fair representation duty. Childs, supra, 831 F.2d at 436. In rejecting the "know or should have known" test in this context, the Third Circuit reasoned that the "knew or should have known" test "subverts congressional policy" in favor of the exhaustion of arbitration procedures before resort to federal courts (id.):

> "Logically, one may distinguish between the right to sue before administrative grievances have been exhausted and the duty to do so. However, we believe that imposing such a duty would exact a heavy toll on the policy favoring administrative resolution of labor problems and would clog the federal courts with premature, defensive lawsuits."

The Third Circuit reaffirmed the logic behind the "date of exhaustion" test in Whittle, supra, 56 F.3d at 490,:

> "[T]here was no way for the employees to know whether they suffered any loss from the union's alleged breach until the arbitration

> decision was issued. It is possible that appellants could have won the arbitration, even if the union's zeal fell below the horizon of fair representation owed them."

The Ninth Circuit below (App. pp. 10a-11a) as well as the Second Circuit in Buttry, supra, 68 F.3d at 1492-93, believed that there should be a difference in the date of accrual based on whether or not the union is actively representing the employee in the arbitration process or was opposing the employees.

The Ninth Circuit's distinction between "flawed representation" (App. p. 10a) and "a failure to represent at all" (App. p. 11a) means nothing in terms of the exhaustion of the grievance-and-arbitration proceedings. By whatever means the grievance-and-arbitration process is exhausted--by the union, by the employees independently of the union or by a series of miscues and other events, as in this case--exhaustion is the rule of federal labor policy.

In fact, this distinction is incapable of meaningful application. The Ninth Circuit itself has recognized that a union does *not* breach its duty of fair representation even by refusing to represent employees in an arbitration proceeding, so long as the union takes steps to insure the employees will be able to attend and represent themselves fairly at the hearing. Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1355 (9th Cir. 1981). There is no reason to impose upon unions the absolute duty to "represent" employees in arbitration proceedings if the union can otherwise fulfill its fair representation duty with alternative means of ensuring

employees fair access to the arbitration process.[5]

The Second Circuit's distinction between unions who are "purporting to fulfill its duty of fair representation" (Buttry, supra, 68 F.3d at 1492) and unions "manifestly opposing, rejecting or abandoning the interests or claims of a member" (id.) is equally meaningless in terms of the exhaustion of the grievance-and-arbitration process. So long as the process is continuing to a final resolution, the union's attitude towards the member or his claims is irrelevant. The real consequence of the union's attitute cannot be determined until the grievance-and-arbitration process concludes. There is no reason to abandon the process simply because the union's attitute may enhance the possibility of loss. To the contrary, it should be in the interest of the union to make the process work notwithstanding its opposition or hostility to the member or his claims. It is unquestionably in the interests of Federal labor policy to encourage the grievance-and-arbitration process to continue to conclusion before involving the Federal courts in the dispute.

For these reasons, the bright-line test using the date the grievance-and-arbitration process is final is the appropriate test to apply in fair representation cases which concern the

---

5

Petitioners have contended that the Union's failure of duty in this case consisted of a failure to respond to their inquiries on the facts and the Union's understanding of contract terms (see App. pp. 51a-54a) and inadequate notice and assistance for the JWAC hearing, as well as a biased panel member on the JWAC hearing panel.

handling of grievance-and-arbitration cases. This is the test that is supported by Federal labor policy favoring exhaustion of internal procedures and the decisions of this Court.

The test based on when the employees knows or should know of the breach of fair representation is inconsistent with and fails to advance Federal labor policy encouraging the use of internal dispute resolution procedures under collective bargaining agreements. This test focuses on the relationship of the union and the member and their conduct towards each other, rather than when the internal proceedings have come to an end. The union-member relationship, however important for the merits of the fair representation claim, are irrelevant to the policy that internal proceedings must be exhausted before resort to the courts.

The conflict in the Circuits as to which test to apply, unless resolved by this Court, will continue to result in inconsistent and unpredictable results. In particular, employees and union members, who must make critical decisions when or if to bring a fair representation action, are at substantial risk of waiting too long if they await the conclusion of the grievance process, yet undermining their hopes of victory in the grievance-and-arbitration proceeding if they sue before the process is over. Federal courts, receiving a protective pre-exhaustion lawsuit, will be put to the unnecessary burden of determining whether to proceed with the court action or themselves await the outcome of the ongoing internal process.[6]

---

[6] Petitioner assume that the district courts will need to (continued...)

CONCLUSION

For the foregoing reasons, Petitioners submit that a Writ of Certiorari should issue.

Respectfully submitted,

CHRISTOPHER W. KATZENBACH
Counsel of Record
KATZENBACH AND KHTIKIAN
Attorneys at Law
1714 Stockton Street, Suite 300
San Francisco, CA 94133-2930
Telephone: (415) 834-1778

---

[6](...continued)
make a reasoned decision whether or not to stay their proceedings pending the outcome of the grievance-and-arbitration process. If the district courts were automatically obligated to stay their proceedings, then forcing employees to file pre-exhaustion fair representation lawsuits would seem entirely pointless.

APPENDIX

APPENDIX

TABLE OF CONTENTS

Page No.

Judgment, United States District Court for the Northern District of California, filed 2/28/96 ..... 1a

Order for Summary Judgment, United States District Court for the Northern District of California, filed 2/28/96 ..... 2a

Memorandum, United States Court of Appeals for the Ninth Circuit, filed 3/13/97 ..... 9a

Order, United States Court of Appeals for the Ninth Circuit, filed 4/21/97 ..... 12a

Opinion, United States Court of Appeals for the Ninth Circuit, filed 1/23/92 ..... 13a

Order, United States District Court for the Northern District of California, filed 8/26/92 ..... 27a

Excerpts from Defendant Western Conference of Teamsters Amended Answers to Plaintiffs' Interrogatories, United States District Court for the Northern District of California 29a

Excerpts from Deposition of Roy Re taken 8/11/95 ..... 33a

Excerpts from Deposition of Thomas J. LaGrave taken 7/11/95 ..... 42a

Excerpts from Minutes of California Trucking Association Committee, 11/8/93 ..... 47a

Letter to Christopher W. Katzenbach from Duane B. Beeson, dated 12/8/92 ..... 50a

Letter to Duane B. Beeson from Christopher W. Katzenbach, dated 12/18/92 ..... 51a

Letter to Duane B. Beeson from Christopher W. Katzenbach, dated 5/5/93 ..... 52a

Letter to Christopher W. Katzenbach from Duane B. Beeson, dated 7/28/93 ..... 55a

Letter to Christopher W. Katzenbach from Duane B. Beeson, dated 11/2/93 ..... 57a

Excerpts from Agreement between CF Air Freight, Inc. and Teamster Local 85 (4/1/88 - 3/31/91) 59a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROD MCKINNEY; and CF AIR FREIGHT EMPLOYEES, Plaintiffs,	)	
v.	)	No. C-94-1608 CAL
EMERY AIR FREIGHT CORPORATION, d/b/a EMERY WORLDWIDE, A CF COMPANY, et al., Defendants.	)	

JUDGMENT

For the reasons set forth in the order for summary judgment signed and filed this date, judgment is hereby entered in favor of defendants and against plaintiffs.

Dated: February 28, 1996.

(s)
CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROD MCKINNEY; and CF AIR FREIGHT EMPLOYEES, Plaintiffs,	)	
v.	)	No. C-94-1608 CAL
EMERY AIR FREIGHT CORPORATION, d/b/a EMERY WORLDWIDE, A CF COMPANY, et al., Defendants.	)	

ORDER FOR SUMMARY JUDGMENT

Defendant Emery Air Freight Corporation has moved for summary judgment. The motion has been opposed, briefed, argued and submitted for decision. The court concludes that there are no genuine issues of material fact; that the decisions are all ones of law; and that summary judgment must be granted in favor of defendant on the ground of the statute of limitations.

I.

This is the second action brought by plaintiffs against Emery. The underlying dispute concerns the coverage of the company's work force under a collective bargaining agreement, following a corporate merger and work force consolidation involving Consolidated Freightways and Emery. In the first action (C-89-2649) this court ruled that the Consolidated Freightways agreement remained in effect, but that Emery was entitled to summary judgment because plaintiffs had not

exhausted the grievance procedures and plaintiffs had not demonstrated a breach of the duty of fair representation by the union.

That decision was reversed by the Ninth Circuit. The circuit held that the question of whether the Consolidated Freightways agreement remained in effect after the consolidation was an issue which was required to be resolved through arbitration and should not have been resolved by this court.

When the matter was remanded to this court, the parties disagreed about what arbitration proceudres should be used. This court then held that the dispute should be resolved through the Joint Western Area Committee's grievance procedures contained in the collective bargaining agreement.

II.

The issue in the present case is what happened after that, and what statute of limitations is applicable. A decision on the effectiveness of the collective bargaining agreement was made by the JWAC on November 8, 1993. The JWAC issued a decision finding that the collective bargaining agreement did not follw the former Consolidated Freightway employees to the Emery terminals when they were integrated into the Emery work force; that it did not continue to control their working conditions at Emery; and that it had no continuing effect after the work force consolidation.

III.

Plaintiffs filed this action on May 6, 1994. They allege a "hybrid" claim for breach of the collective bargaining agreement by Emery, and a breach of the duty of fair

representation by the union. Section 301 of the L.M.R.A., 20 U.S.C. § 185, provides that employees have a federal cause of action against their employers for breach of a collective bargaining agreement. However, in order to proceed with a Section 301 suit against their employer, the employees must show not only a breach of the collective bargaining agreement, but must also demonstrate that the union breached its duty of fair representation. Schlacter-Jones v. General Telephone, 936 F.2d 435 (9th Cir. 1991). United Parcel Service v. Mitchel, 451 U.S. 56 (1981); Shane v. Greyhound Lines, Inc., 868 F.2d 1057 (9th Cir. 1989).

Defendant moves for summary judgment on the ground that plaintiffs' suit for a breach of the duty of fair representation is barred by the statute of limitations. All sides agree that the applicable statute is the six month statute under Section 10(b) of the National Labor Relations Act. Delcostello v. Teamsters, 462 U.S. 151 (1983); Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985).

Plaintiff contends that the statute did not begin to run until the date of the JWAC decision, November 8, 1993. Their filing on May 6, 1994 would then be within the six month period. Defendant contends that the six months started sooner, when plaintiffs were advised by the union that the union would not represent them in the JWAC proceedings.

IV.

Because of the applicable case law, the resolution of the dispute requires a more specific identification of what the alleged breach of the duty of fair representation is here, as well as an examination of the communications between the union and plaintiffs leading up to the JWAC hearing.

The most applicable Ninth Circuit authority is Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986). The court there said (p. 1509) that the six month period generally begins to run when the employee knows or should know of the alleged breach of the duty of fair representation by the union. In that case, the court was concerned with two potential breaches of the duty. One was the conduct of the union prior to the grievance hearing. The other was how the union presented the grievance to the grievance panel. The court held that when the claims concern the question of how the grievance was presented by the union, the statute of limitations would be tolled until that date. In essence, the conduct of the union prior to the hearing was merged into its conduct at the hearing.

That is not the situation presented here. Plaintiffs do attempt to argue about the manner in which the grievance was presented to the JWAC. But in reality, there was no conduct by the union at the hearing. Indeed, the whole issue in this dispute is whether the union improperly declined to represent plaintiffs at the hearing at all. In such a setting, where the union declines to represent the employees at a grievance hearing, there is no guidance from the Ninth Circuit on when the statute should accrue.

We do have the guidance of an analogous decision from the Second Circuit, Buttry v. General Signal Corporation. 68 F.3rd 1488 (2d Cir. 1995). The Second Circuit there distinguished between a claimed breach of the duty of fair representation based upon doing a poor job at the grievance hearing, versus a claim based upon the union's refusal to represent employers at the hearing at all. The court there held that the statute begins to accrue when the plaintiffs-employees became aware that the union would not represent their interests. And the court held that such a claim is not saved by equitable

estoppel or equitable tolling.

V.

We must then turn to the factual history of when the plaintiffs knew or should have known that the union would not represent them at the JWAC hearing. There are no genuine issues of material fact regarding the following communications:

The issue of representation first arose at the hearing at which this court decided that the procedures to be used were those of the JWAC. At that hearing, counsel for the union advised the court and plaintiffs' counsel that the union would take responsibility for allowing the plaintiffs to rpesent their case before the JWAC. This court questioned the union counsel as to whether, in view of the adversary positions that had been taken in this litigation, the union could really represent the plaintiffs' position. Union counsel said that they could do so, primarily by making sure that plaintiffs, through their own direct participation in proceedings before the JWAC, would be able to make their case and say everything they wanted to. That was in August 1992.

In December 1992 union counsel sent a letter to plaintiffs' counsel stating that the union was deferring submitting the dispute to the JWAC, so that plaintiffs could if they wish, submit a new grievance which would update the issues to be arbitrated. There were then some communications from plaintiffs' counsel to the union's counsel, but nothing was resolved.

The key communication for the purposes of this dispute is a letter of July 28, 1993 from the union's attorney to the plaintiffs' counsel. In that letter, the union counsel stated: "In view of the history of the positions taken by the parties at

various stages of the proceedings, [the union] does not believe it appropriate to be the spokesperson at JWAC for [plaintiffs]. A representative of [the union] will attend the hearing and will take appropriate steps to insure that [plaintiffs] will have a full opportunity to present their case."

This was an unequivocal statement by the union's counsel that the union would not represent the plaintiffs at the JWAC hearing, but would do no more than procedurally keep the proceedings open for plaintiffs to present their own case.

Other communications followed, including letters directly from the union to plaintiffs, to advise plaintiffs of the dates of the hearing and whom to contact for further information. At the first hearing, scheduled for August 1993, the hearing was postponed because no plaintiffs appeared. The hearing was continued until November. The union counsel advised plaintiffs' counsel of the November hearing and the persons to contact. The record indicates that neither the union counsel nor the union received any reply to those communications, and no representative of plaintiffs contacted the hearing officer about the hearing. At the hearing on November 8, 1993, a representative of the union was present. However, no one appeared on behalf of plaintiffs. The JWAC then made its decision adverse to plaintiffs.

It is apparent that any possible breach of the duty of fair representation does not concern how good a job the union did at the JWAC hearing. The union was present, but there was no representative of plaintiffs. And plaintiffs were clearly told ahead of time that the union would not represent their interests at the hearing, but would only be there to be sure that the plaintiffs had an opportunity to be heard themselves.

This record demonstrates that the real claim is that the union declined to represent plaintiffs. That position was clearly stated to plaintiffs on July 28, 1993. At that time plaintiffs both knew, and should have known, that the union would take no action to represent them before the JWAC. The statute of limitations on that claim therefore accrued in July 1993.

There is no basis for plaintiffs' contending that the staute of limitations was tolled or that the union is equitably estopped. Plaintiffs simply took no action in response to the union's communications. Plaintiffs made no attempt to use the grievanc hearing in good faith, and really did nothing at all. The union did not mishandle the grievance hearing on November 8. Indeed, it did what it said it would do — see that the procedures were open for plaintiffs to make their own presentation.

The court therefore concludes that this action, diled in May 1994, was outside of the statute of limitations. IT IS THEREFORE ORDERED that summary judgment be entered in favor of defendants.

Dated: February 28, 1996.

(s)_____
CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROD McKINNEY; CF AIR FREIGHT EMPLOYEES Plaintiffs-Appellants, v. EMERY AIR FREIGHT CORPORATION, Defendant-Appellee.	)	No. 96-15602 D.C. No. CV-94-01608-CAL MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding
Argued and Submitted February 12, 1997
San Francisco, California

Before: SCHROEDER and O'SCANNLAIN, Circuit Judges, and KELLEHER,** District Judge.

Rod McKinney and other CF Air Freight ("CFAF") employees appealed the district court's summary judgment in

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

favor of Emery Air Freight Corporation, d/b/a Emery Worldwide ("Emery"). McKinney brought this "hybrid" action pursuant to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), alleging Emery's breach of a collective bargaining agreement and the International Brotherhood of Teamsters' breach of its duty of fair representation following a CFAF/Emery corporate merger and work force consolidation. After several years of litigation, the issue of whether Emery is bound by the terms of a prior collective bargaining agreement was submitted to a Joint Grievance Committee. Following a hearing conducted in the absence of plaintiffs, the Committee decided that Emery was not bound by the contract. This appeal involves the employees' claims that the union breached its duty of fair representation in connection with the grievance proceeding.

The employees' principal claim is that the union breached its duty by refusing to represent them at the grievance hearing. The district court ruled that this claim was bared by the six-month statute of limitations, because plaintiffs received notice that the union would not represent them more than six months before the complaint was filed in district court. See DelCostello v. Teamsters, 432 U.S. 151, 172 (1983). Plaintiffs contend on appeal that the district court erred because when the claim of breach of duty of fair representation involves a grievance or arbitration proceeding the claim does not accrue until the plaintiffs learn the result of the proceeding. The Ninth Circuit authority relied on by plaintiffs, however, establishes no such bright line rule. See Galindo v. Stoody Co., 793 F.2d 1502, 1509 (9th Cir. 1986) (where union decides not to bring grievance at all, cause of action accrues "when the employee learns or should have learned of the union's decision"). Kozy v. Wings West Airlines, 89 F.3d 635 (9th Cir. 1996), is distinguishable because it involved a union's allegedly flawed representation at an

arbitration hearing, rather than a failure to represent al all, and because its ruling was based on jurisdictional requirements not present here. See id. At 637-40. The district court correctly concluded this case was most analogous to the Second Circuit's decision in Buttry v. General Signal Corp., 68 F.3d 1488 (2d Cir. 1995), and out circuit law is not inconsistent with that decision. See Galindo, 793 F.2d at 1509.

Appellants also contend that the union breached its duty by failing to give them adequate notice of the grievance hearing. Here again we agree with the district court that the appellants received ample notice in the July and November letters. The letters told the appellants that their grievance would be considered at the upcoming meetings, and instructed them to call for precise details. They never did, and have offered no explanation for their failure to do so.

Finally, appellants contend that they have an independent claim of breach in connection with the role that Archie Murrietta played in the conduct of the grievance proceeding, and that they could not have known of this claim until the November 8 hearing. The record shows, hoever, that despite receiving notice, appellants never appeared at the hearing and did nothing to protect their interests there. We agree with the district court that appellants did "nothing at all" to avail themselves of the grievance process. They should not now be heard to complain about the manner in which it was conducted.

AFFIRMED

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROD McKINNEY; CF AIR FREIGHT EMPLOYEES Plaintiffs-Appellants, v. EMERY AIR FREIGHT CORPORATION, Defendant-Appellee.	)	No. 96-15602 D.C. No. CV-94-01608-CAL (Northern California) ORDER

Before: SCHROEDER and O'SCANNLAIN, Circuit Judges, and KELLEHER,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 2 [illegible] 1992

ROD MCKINNEY and CF AIR FREIGHT EMPLOYEES,
Plaintiffs-Appellants/
Cross-Appellees,

v.

EMERY AIR FREIGHT CORPORATION, d/b/a EMERY WORLDWIDE, A CF COMPANY,
Defendant-Appellee/
Cross-Appellant.

Nos. 90-15600
90-15613
D.C. No.
CV-89-2649-CAL
OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
December 11, 1991—San Francisco, California

Filed January 23, 1992

Before: Ruggero J. Aldisert,* Alfred T. Goodwin and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Aldisert

*Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

SUMMARY

Labor/Arbitration

Reversing and remanding a district court grant of partial summary judgment, the court of appeals held that whether a collective bargaining agreement had terminated after consolidation of different workforces was a question to be properly decided by an arbitrator rather than by the district court.

Appellants Rod McKinney and CF Air Freight Employees brought an action under Sec. 301(a) of the LMRA requesting a declaration that a CBA was in full force and effect as between the union and a successor employer, Emery Air Freight Corporation. Rather than an arbitrator, as specified in the agreement, the district court decided that it would determine the vitality of the agreement. The district court granted partial summary judgment for the appellants, concluding that Emery was bound by the CBA.

[1] A dispute over whether a contract ever existed must be decided by a court. The issue over whether that contract has expired, or has been terminated or repudiated is for the arbitrator if the breadth of the arbitration clause is not in dispute. [2] To interpret such an agreement and to determine whether a contract has been terminated or abrogated, the governing criteria are not judge-made principles of the common law but the practices, assumptions, understandings, and aspirations of the going industrial concern referred to by the Supreme Court as "the industrial common law." [3] From the facts and circumstances of this case, the court concluded that a labor contract between the union and the successor employer did exist at one time. What remained to be determined was whether the contract existed only for limited purposes, and whether the contract remained in effect after the consolidation of the work forces. Accordingly, the matter was remanded for a determination by an arbitrator whether Emery was bound by a labor

agreement covering the subject matter of the appellants' complaint.

COUNSEL

Christopher W. Katzenbach, San Francisco, California, for the plaintiffs-appellants/cross-appellees.

William J. Emanuel, David J. Hamilton, Morgan, Lewis & Bockius, Los Angeles, California, for the defendant-appellee/cross-appellant.

OPINION

ALDISERT, Circuit Judge:

Several issues have been presented in these consolidated appeals by former employees of CF Air Freight, Inc. (hereinafter "the McKinney plaintiffs") at No. 90-15600, and by Emery Air Freight Corporation at No. 90-15613, but the question that controls our decision is whether the district court erred by not ordering the parties to arbitrate the question whether a collective bargaining agreement between the McKinney plaintiffs' employer and Local 85 of the Teamsters Union had been terminated.

The issue arises in an action brought by the McKinney plaintiffs against Emery under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), requesting a declaration that the collective bargaining agreement was in full force and effect, and damages for the breach thereof. Largely influenced by the parties' united request that the court meet the issue, rather than an arbitrator, the district court decided that it would determine the vitality of the agreement. It concluded that Emery was bound by an agreement with

Teamster Local 85, and entered partial summary judgment for the McKinney plaintiffs on this issue.

The court denied the plaintiffs further relief, holding that because the core item of claimed damages resulted from an alleged loss of their seniority status, the plaintiffs' claims must proceed through the grievance procedures of the agreement before they can be considered by the court. Accordingly, the district court entered summary judgment in favor of Emery on the damages issue. On appeal, the McKinney plaintiffs contend that the court erred in requiring them to exhaust the grievance mechanism; Emery argues that the court erred in concluding that it was bound by the Local 85 agreement.

The district court's jurisdiction was premised on 29 U.S.C. § 185(a). We have appellate jurisdiction under 28 U.S.C. § 1291. The appeals were timely filed under Rule 4(A), F.R.A.P.

I.

The McKinney plaintiffs offer at least two reasons why they should be excused from pursuing the grievance remedies under the Local 85 agreement: (1) Emery's refusal to recognize the agreement constituted a repudiation of the contractual remedy and (2) Local 85 breached its duty of fair representation. For its part, Emery contends that the Local 85 agreement was abrogated by the ruling of the Regional Director of the National Labor Relations Board that as of April 17, 1989, the date of the consolidation of the work forces, Local 85 ceased to be the sole collective bargaining representative of the former CFAF employees. Since that date, they have been jointly represented by Teamster Locals 70, 85 and 287. *See Emery Air Freight Corp. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local Union No. 85*, No. 32-UC-252 (N.L.R.B. May 14, 1990).

We asked the parties to brief and argue the question whether the continued existence of the Local 85 collective

bargaining agreement should have been referred to arbitration. The agreement contained an arbitration clause covering "[a]ny grievance or controversy" between the parties. We asked the litigants here to consider two recent cases of this court holding that disputes over contract terminations are for arbitrators and not the courts: *Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1338-39 (9th Cir. 1990), *cert. denied*, _ U.S. _, 111 S. Ct. 1684 (1991), and *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 509-12 (9th Cir. 1987).

After considering the supplemental briefing and hearing oral argument on this issue, and after evaluating the complicated factual scenario, we are persuaded that the question whether the May 15, 1989, written instrument constitutes a binding labor agreement supporting the McKinney plaintiffs' claims is a matter properly determined by an arbitrator rather than by the court. Accordingly, we vacate the judgment of the district court and remand these proceedings with a direction that the district court refer the question of the contract's viability to arbitration.

II.

We review *de novo* a district court's grant or denial of summary judgment. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether any genuine issues of fact exist and whether the district court correctly applied the relevant substantive law. *Judie v. Hamilton*, 872 F.2d 919, 920 (9th Cir. 1989).

III.

The dispute arose after the merger and consolidation of CFAF and Emery, two shipping companies with a number of

terminals in the San Francisco area. The plaintiffs are Rod McKinney, a former CFAF employee currently working for Emery, and CF Air Freight Employees, an organization of dock workers and truck drivers formerly employed by CFAF.

Before the merger, the McKinney plaintiffs worked for CFAF, where they constituted a single bargaining unit represented by Teamster Local 85. Workers in the old Emery company also constituted a single bargaining unit, but they were jointly represented by Teamster Locals 70, 85 and 287.

In early 1989, CFAF employees were working under an extended collective bargaining agreement that was due to expire on March 31, 1989. Negotiations between Local 85 and CFAF had produced a final offer from the company, which the employees had not approved. Meanwhile, Consolidated Freightways, Inc., the parent company of CFAF, purchased all of the outstanding shares of the old Emery company on March 31, 1989. Consolidated Freightways merged its two companies—CFAF and the old Emery—on April 6, 1989, retaining the Emery name as the title of the new company. Realizing that a consolidation of operations was in the works and that their terminal was likely to be closed, the CFAF employees voted to accept the final offer on April 9, 1989, three days after CFAF had ceased to exist.

Emery did indeed plan to close the CFAF terminal. In pursuit of this goal, an interim Change of Operations agreement was signed on April 13, 1989, by Emery and by the local unions on behalf of Emery employees. The agreement designated a Change of Operations Committee and set forth guidelines concerning seniority and workplace assignments that would govern the consolidation of the work forces. Consolidation commenced according to the terms of this agreement.

Local 85, however, continued to assist the former CFAF employees in pursuing a collective bargaining agreement with the successor company. On May 15, 1989, a Local 85 official

and Emery's corporate counsel signed an instrument on behalf of "Teamster Local 85" and "CF Air Freight, Inc." Below the Local 85 signatory appears the handwritten notation: "Ratified April 10, 1989." What muddies the factual and legal waters are two critical circumstances. First, although the contract names "CF Air Freight, Inc." as one of the parties, CFAF had ceased corporate existence five weeks before, on April 6, 1989. Second, the Regional Director of the National Labor Relations Board has ruled that as of April 17, 1989, the date of the consolidation of the work forces, Teamster Local 85, the signatory to the instrument, was not the employees' only collective bargaining representative; they were represented jointly by Teamster Locals 70, 85 and 287. *Emery Air Freight Corp.*, No. 32-UC-252 (N.L.R.B. May 14, 1990).

Eberhard G. H. Schmoller, Emery's Vice President and Corporate Counsel, stated in a declaration in support of Emery's motion for summary judgment:

> 6. The CFAF driver/dockmen voted to accept the offer on April 9, 1989, three days after the merger of the CFAF and Emery corporate entities. They were given the wage and benefit increases retroactive to April 1, 1988. In order to confirm in writing the basis for the wage increase—and especially for the basis for the pension contribution increase—Local 85 asked Emery (CFAF's successor-in-interest) to sign an agreement consisting of the offer CFAF had previously made. . . . The document was signed by me on behalf of CFAF. I was responsible for making the decision to sign the agreement on behalf of Emery/CFAF. The sole motivation in signing the agreement was to facilitate the payment of retroactive wage and pension increases.

Schmoller Declaration at 3-4; Supp. E.R. 15 at 3-4.

On May 16, 1989, the Change of Operations Committee held a formal hearing and set final terms for work force con-

solidation. A disagreement over seniority was referred to the National Grievance Committee, which resolved the matter on August 10, 1989.

The McKinney plaintiffs assert that the consolidation violated their rights under numerous provisions of the May 15 agreement, and take issue with Emery's statement that it signed the agreement solely to facilitate the payment of retroactive wages and pension increases. They argue that their seniority with CFAF should have counted as seniority with Emery, thus giving them precedence over some Emery employees. Brief for McKinney Plaintiffs at 9-10. They also summarily assert that Emery breached contract provisions concerning vacation pay, use of part-time employees, reductions in benefits and other matters. *Id.* at 29.

The McKinney plaintiffs contend that they presented their grievances to Local 85 and were rebuffed, *id.* at 10-11, and that Emery "expressed [no] meaningful interest in resolving this dispute through the contract grievance procedures." *Id.* at 27. Emery denies that the plaintiffs have exhausted their contractual remedies.

The McKinney plaintiffs filed this lawsuit in July 1989, seeking a declaratory judgment that the collective bargaining agreement remains in effect, as well as damages for Emery's purported breach thereof.

IV.

[1] We begin the inquiry as to whether the arbitrator or the court should decide the efficacy of the May 15 written agreement by referring to case law of this court. Precepts laid down instruct us to distinguish between a dispute over whether a contract ever existed and a dispute over whether a contract has expired or has been terminated or repudiated. In the former case, the issue is for the court; in the latter, the issue is for the arbitrator if the breadth of the arbitration clause is not

in dispute. *Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1340 (9th Cir. 1990), *cert. denied*, _ U.S. _, 111 S. Ct. 1684 (1991).

There can be no dispute about the breadth of the arbitration clause here. It is unquestionably broad, covering "[a]ny grievance or controversy affecting the mutual relations of the Employer and the Union." Agreement of May 15, 1989, at 44; ER 15, Exhibit A, at 44. We have said that "[a]n agreement to arbitrate 'any grievance or controversy affecting the mutual relations of the [parties]' . . . or any other broad arbitration clause, such as 'any dispute arising out of this Agreement,' ordinarily requires us to hold that the parties have provided for arbitration of disputes regarding termination [of the contract]." *Camping*, 915 F.2d at 1338-39 (quoting *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 510 n.2 (9th Cir. 1987)).

The question we must resolve is whether a labor agreement ever existed between Local 85 and Emery to support the McKinney plaintiffs' claims.

V.

We express the precise inquiry for ultimate resolution with care, because the parties' unwillingness to recognize the requirement that the question of contract termination or repudiation be referred to arbitration ignores the limited perimeters of our examination. The McKinney plaintiffs, for example, contend that the issue is controlled by *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), but that case stands primarily for the proposition that " 'whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' " *Id.* at 547 (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)). That is precisely the issue we are deciding here.

For its part, Emery anchors its objection to arbitration on the theory that this court recognizes a distinction between agreements "abrogated by operation of federal labor law," which it says require a court's decision, and agreements terminated or abrogated "by operation of the contract's termination clause or general principles of contract law," which are for the arbitrator. First supp. letter brief for Emery at 3 (citing *Camping*, 915 F.2d at 1338). We find no basis for this distinction in either *Camping* or *Interstate Distributor*.

Emery has lifted out of context a statement in *Camping* directed to a footnote in *Interstate Distributor*, 832 F.2d at 511 n.4, recognizing the courts' authority to decide whether an employer has repudiated a prehire agreement under Section 8(f) of the National Labor Relations Act. *See Camping*, 915 F.2d at 1338. In such cases, "[t]he employer's right to repudiate is created by, and set forth specially in, a federal statute rather than . . . in the collective bargaining agreement itself or in a body of common or other law applicable generally to contract matters." *Interstate Distrib.*, 832 F.2d at 511 n.4.

Emery's attempt to expand this limited exception to encompass the agreement here must fail for three reasons. First, no statute confers on Emery an absolute right to repudiate the May 15 agreement. Second, the agreement is a collective bargaining agreement and not a Section 8(f) prehire agreement. Third, we recognized in *Camping* that the rule requiring the court to decide the issue of repudiation in prehire agreements was superseded by *Deklewa v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3*, 282 N.L.R.B. 1375 (1987), for all repudiations occurring after February 20, 1987. *Camping*, 915 F.2d at 1337 n.2, 1338-39. Thus, any post-*Deklewa* repudiations are subject to the *Interstate Distributor* rule that " 'when the collective bargaining agreement contains a customary arbitration clause[,] acts of repudiation and other acts of termination must be submitted to arbitration.' " *Camping*, 915 F.2d at 1338 (quoting *Interstate Distrib.*, 832 F.2d at 511 n.4).

Because Emery has introduced an inhibiting conception of "federal labor law," it may be well to delineate some fundamental precepts utilized in deciding labor disputes. The foundation is grounded in statutes such as the National Labor Relations Act and the Labor-Management Reporting and Disclosure Act, among others. The labor agreement is the method of implementing our national labor policy, but it is not a run-of-the-mill commercial contract. Professor Archibald Cox has quoted Dean Shulman in this respect:

> "[The collective-bargaining agreement] is not the 'typical' offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not an undertaking to produce a specific result; indeed, it rarely speaks of an ultimate product. It is not made by parties who seek each other out to make a bargain from scratch and then go[ ] [their] own way. . . . Though cast in an adversary position, both are dependent upon their common enterprise. . . . They meet in their contract negotiations to fix the terms and conditions of their collaboration in the future."

Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1492 (1959) (quoting Address by Dean Schulman, *The Role of Arbitration in the Collective Bargaining Process*, delivered at the Univ. of Cal., Mar. 4, 1949, in *Collective Bargaining and Arbitration* 19, 20-21 (Inst. of Ind. Relations, Univ. of Cal. 1949)).

[2] "The resulting contact," says Professor Cox, "is essentially an instrument of government, not merely an instrument of exchange." *Id.* To interpret such an agreement and to determine whether a contract has been terminated or abrogated, "[t]he governing criteria are not judge-made principles of the common law but the practices, assumptions, understandings, and aspirations of the going industrial concern." *Id.* at 1500. The Supreme Court has described this as "the industrial com-

mon law." In *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960), the Court stated: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." Commentators have emphasized that "[u]nquestionably, custom and past practice constitute one of the most significant factors in labor-management arbitration." F. Elkouri & E. Elkouri, *How Arbitration Works* 389 (3d ed. 1973); *see also* S. Block, *Customs and Usages as Factors in Arbitration Decisions* 312-13 (1962), *reprinted in* R. Aldisert, *The Judicial Process* 299 (1976).

All of these components—statutes, case decisions, principles of contract law, practices, assumptions, understandings, the common law of the shop and "the industrial common law"—are part of what is known as the federal labor law. Moreover, it is the general understanding, indeed it is the keystone of the national labor policy announced in the *Steelworkers* trilogy,[1] that skilled labor arbitrators, rather than judges, are better positioned and equipped to identify and to apply the common law of the shop.

We are satisfied that previous decisions of this court tell us how to proceed here:

> The court must determine whether a contract *ever* existed; unless that issue is decided in favor of the party seeking arbitration, there is no basis for submitting any question to an arbitrator. . . . [O]nce it is found that a contract did exist at some time, the questions of whether that contract has expired, or has

[1] *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

> been terminated or repudiated, may well present arbitrable issues, depending on the language of the agreed-upon arbitration clause.

Camping, 915 F.2d at 1340; *see Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991). We now apply these precepts to the facts in this case.

VI.

It is undisputed that Emery is the successor corporation to both CFAF and the old Emery company; that at the beginning of 1989, CFAF employees were working under a labor agreement between Local 85 and CFAF that was due to expire on March 31, 1989; that CFAF had extended a final offer; that the companies were merged on April 6, 1989; that the employees had ratified the CFAF offer by April 10, 1989; and that Local 85 and Emery signed a labor agreement on May 15, 1989. We have Emery's acknowledgement that it was a party to the agreement: "When Local 85 accepted the company's offer by ratification of the membership, a collective bargaining agreement was created between Emery and Local 85." Second supp. letter brief for Emery at 2; *see* Brief for Emery at 15. We also have Schmoller's statement that he signed the May 15 agreement on behalf of Emery to confirm a retroactive pay increase and to implement increased pension contributions, a statement contradicted by the McKinney plaintiffs.

[3] From this we conclude that a labor contract between Local 85 and Emery did exist at one time. *See Presto Casting Co. v. N.L.R.B.*, 708 F.2d 495, 498 (9th Cir.), *cert. denied*, 464 U.S. 994 (1983). What remains to be determined is whether the contract existed only for the limited purposes described by Schmoller, and whether the contract remained in effect after the consolidation of the work forces.

We believe that this is a paradigm case to refer to the particular expertise of arbitrators, who will be able to sift through

the facts and apply what the Supreme Court has described as "the industrial common law." *Warrior & Gulf Navigation*, 363 U.S. at 581-82.

VII.

In the view we take of this case, we do not meet the substantive issues raised on appeal by the parties. The judgment of the district court is **VACATED** and the proceedings **REMANDED** with a direction to refer to arbitration the question whether Emery is bound by a labor agreement covering the subject matter of the McKinney plaintiffs' complaint.

WILLIAM J. EMANUEL
JOHN F. GUEST
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Twenty-Second Floor
Los Angeles, California 90017-3189
(213) 612-2550

Attorney for Defendant
Emery Air Freight Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROD MCKINNEY; and CF AIR FREIGHT EMPLOYEES, Plaintiffs, vs. EMERY AIR FREIGHT CORPORATION, d/b/a EMERY WORLDWIDE, A CF COMPANY, Defendant.	)	CASE NO. C 89 2649 CAL ORDER DATE: August 21, 1992 TIME: 9:30 a.m. COURTROOM: 10, 19th Floor

This matter came before the Court, the Honorable Charles A. Legge presiding, on August 21, 1992 at 9:30 a.m., on plaintiffs' motion to refer this case to arbitration and defendant's and intervenor's cross-motion to refer the case to the contractual grievance and arbitration procedure. The Court is fully advised of the matter and has considered the mandate of the Court of Appeals as well as all the pleadings, evidence and

arguments submitted by the parties. In light of all the foregoing, and for the reasons set forth in the record in open court on August 21, 1992:

IT IS HEREBY ORDERED that plaintiffs' motion is denied and defendant's and intervenor's motion be and the same is hereby granted; and the dispute as to whether the parties are bound by the 1988-1991 collective bargaining agreement between Teamsters Local 85 and CF Air Freight, Inc. is hereby referred to the grievance procedure contained in Article 36 of that agreement.

DATED: August 26, 1992

(s)_____
HONORABLE CHARLES A. LEGGE
UNITED STATES DISTRICT COURT
JUDGE

Ronald Yank, No. 41200
Lisa Lee Pate, No. 0142083
CARROLL, BURDICK & McDONOUGH
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, California 94104
Telephone: (415) 989-5900
Facsimile: (415) 989-0932

Attorneys for Defendant
Western Conference of Teamsters

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROD MCKINNEY; and CF AIR FREIGHT EMPLOYEES, Plaintiffs, vs. EMERY AIR FREIGHT CORPORATION, d/b/a EMERY WORLDWIDE, A CF COMPANY; LOCAL 85, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO; WESTERN CONFERENCE OF TEAMSTERS; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, Defendants.	) No. C-94-1608-CAL (ARB)) DEFENDANT WESTERN) CONFERENCE OF) TEAMSTERS' AMENDED) ANSWER TO PLAINTIFFS') FIRST SET OF) INTERROGATORIES

PROUNDING PARTY: PLAINTIFFS
RESPONDING PARTY: DEFENDANT WESTERN CONFERENCE OF TEAMSTERS

***

INTERROGARORY NO. 3:

State the date on which you first informed Local 85 of the specific date of the hearing before the Joint Western Area Committee in November 1993 in Case No. 11-93-4668, pertaining to the 1988-1991 Agreement..

ANSWER TO INTERROGATORY NO. 3:

WCT objects to this Interrogatory to the extent it seeks information unrelated to hearings or proceedings pertaining to Plaintiffs' grievance, on the grounds that such information is neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence. WCT further objects to this Interrogatory to the extent that it seeks information which are subject to the attorney-client privilege and/or the joint defense privilege and/or are protected attorney-work product.

Without waiving these objections, WCT answers this interrogatory as follows:

WCT did not inform Local 85 of a specific date of the hearing before the Joint Western Area Committee in November 1993 in Case No. 11-93-4668. As will all other matters on the

Joint Western Area Committee's hearing agenda for the November 1993 meeting, as well as other JWAC quarterly meetings, the parties who involved in each hearing were notified only that a particular hearing would occur during the 5-day week of the quarterly JWAC meeting. Specific hearing times depended on the availability of individuals involved in the hearing and were not scheduled in advance.

INTERROGATORY NO. 4:

Give the name of each person who was present during the Executive Session of the California Trucking Association Committee of the Joint Western Area Committee in November 1993 in Case No. 11-93-4668.

ANSWER TO INTERROGATORY NO. 4:

The names of the persons who were present during the Executive Session of the California Trucking Association Committee of the Joint Western Area Committee in November 1993 in Case No. 11-93-4668 are as follows:

Archie Murrietta, Ben Ploshay, Ray Burkhart, Jim Goodwin, and Gordon Kirby.

INTERROGATORY NO. 5:

Give the name of each person who voted on the disposition of Case No. 11-93-4668 during the Executive Session of the California Trucking Association Committee of the Joint Western Area Committee.

ANSWER TO INTERROGATORY NO. 5:

The name of each person who voted on the disposition of Case No. 11-93-4668 during the Executive Session of the California Trucking Association Committee of the Joint Western Area Committee in November 1993 are as follows:

Ben Ploshay, Ray Burkhart, Jim Goodwin, and Gordon Kirby. While Archie Murrietta served as the Chairman at the Session he did not vote on the disposition of Case No. 11-93-4668. Only four individuals, two representing the employer, Gordon Kirby and Ben Ploshay, and two representing the union, Ray Burkhart and Jim Goodwin, voted on the disposition of Case No. 11-93-4668

***

Dated: February 10, 1995

CARROLL, BURDICK & McDONOUGH

By (s)_____

Ronald Yank
Lisa Lee Pate
Attorneys for Defendants Western Conference of Teamsters

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROD McKINNEY; and CF AIR FREIGHT EMPLOYEES, Plaintiffs,	)	Case No. C94-1608 CAL (ARB)
vs.	)	
EMERY AIR FREIGHT CORP., d/b/a EMERY WORLDWIDE, a CF COMPANY; LOCAL 85, IBT, WESTERN CONFERENCE OF TEAMSTERS; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, Defendants.	)	

DEPOSITION OF ROY J. RE
FRIDAY, AUGUST 11, 1995
VOLUME I
(Pages 1-135, inclusive)

C & H COURT REPORTERS
116 MERION TERRACE
MORAGA, CALIFORNIA 94556
I.D. No. 68-0290999
(510) 376-6770 (800-254-9991)
FAX (510) 376-6771 PAGER (800) 408-0754

***

Page 93, line 18 - page 94, line 6:

Q Was Mr. Murrietta responding in a calm, quiet sort of fashion? Die he seem to be agitated in any kind of way?

A Archie does not get kind of agitated. He has a good presence, good control. His response to the drivers was, "You guys need to get yourself an attorney."

Q You recall him saying that?

A Yes. I thought it was a peculiar statement to make.

Q This was after he indicated to them that seniority would be dovetailed and this is the normal way in which these were handled?

A Yes.

***

Page 95, line 4-14:

Q People were expressing their concern that if there was a certain type of dovetailing, they can end up without jobs?

A Actually, the day of hire that was — of all the dovetail procedures, that was the most damaging to the CF people.

Q It was during this conversaiton that at some point you recall Mr. Murrietta indicating to the people "You may want to get a lawyer," or "You better get a lawyer ," or something to that extent?

A He says, "You better get a lawyer."

***

Page 96, lines 3-7:

A Not only that, but also the fact — I mean that was part of it, but rather that endtailing was a proper subject of collective bargaining. I made the proposal. Archie Murrietta said he would not accept that at the bargaining table.

***

Page 96, line 20 - page 97, line 5:

Q I understand from what you said before, the language provided that if CF acquired a company —

A Right. The union, or nonunion, that their employees would endtail to our employees.

Q The employees of the acquired --

A That's correct.

Q Would be endtailed to you?

A That's correct.

Q How did this discussion take place with Mr. Murrietta? Was it about your proposal?

A Yes, it was.

***

Page 97, line 15 - page 98, line 6:

Q To the best of your recollection, what did Mr. Murrietta say to you?

A That I could not present that proposal.

Q Did he indicate why?

A At first he said it was illegal, that it is illegal. That is when we got into the subject of it being — it was a proper subject of collective bargaining.

Q After that discussion of legality, did he say anything further about why you couldn't present that to the company?

A He called somebody at the Beeson office, so I'm told, and he excused himself from the meeting and went to call Duane Beeson's office, and then came back and said: "Yeah, you can put it on," not too much more than that at that point. He discussed it again later.

***

Page 98, line 20 - Page 99, line 14:

A He stated that he called Beeson's office.

Q He indicated that you were right, you could lawfully make such a proposal?

A He was not pleased with it. We kind of got crossways on that.

Q He didn't at that point continue to say to you, "You can't make that proposal"?

A No, he didn't.

Q He backed off?

A That's correct.

Q Then you went into the meeting with management?

A That's right.

Q Did you actually present this proposal?

A Yes, it had been reduced to writing.

Q Was there anything at that point said across the table from the management people?

A No. They would take it under submission along with the rest of the proposals, with the counterproposals.

***

Page 100, line 1 - 18:

A We had not — excuse me — not a caucus. We went to a break. We exited the room. I went to the men's room.

Q That's usually where all the business gets done.

A Yes.

(Remarks outside the record.)

After a number of hours we thought this might be necessary. But Mr. Wayne Lashly came in, who is a member of management and part of the company's negotiating team. We had a pretty good rapport over the years prior to the merger, and he mentioned to Mr. Murrietta, had stated to him, there would be no — no way these proposals would fly.

This was said after I had exited the room. He said this unequivocally, he would not accept it. Even though it had been introduced on the table, he would not allow it to go into play.

***

Page 107, line 2 - 17:

A At that time I asked Mr. Hart, "Would you please interrupt Mr. Murrietta," who was controlling the meeting, "and ask him what the status is of the CF agreement? Is there really a necessity of negotiating an agreement with Emery because of the language that they had in their contract?" Vaguely, basically he said that if another agreement was in place, that the better

conditions would take place and so on and so forth, and if we were the company that did the acquiring here, why don't we assume the contract that has just been negotiated and ratified by the CF drivers.

At that time the response — Mr. Terry Hart interrupted the meeting, and at that time Mr. Murrietta's response to him was, "That contract is dead."

***

Page 112, line 3 - page 113, line 6:

Q Were there ever any other discussions that you had or at any time present heard Mr. Murrietta way anything on this issue about whether the CR Air-Local 85 agreement survived?

A Mr. Murrietta emphatically stated on several occasions that he was questioned about the survivability of that particular agreement and stated that it did not, from day one.

Q Okay. You say on several occasions?

A Several occasions.

Q What other occasions?

A Any other time.

Q When were they?

A Negotiating sessions, any time a question would come

up with regard — "What about this particular condition with the CF agreement?" "No, it does not exist."

Q Now, did Mr. Murrietta ever indicate the basis of his --

A Never. You don't have to finish that question. He never once gave me a basis or a reason for stating it.

Q Let me finish the question so we have it on the record.

A Go ahead.

Q Did Mr. Murrietta ever indicate the basis for his saying that the contract of CF Air Freight did not survive?

A No.

***

Page 113, line 15 - 25:

Q Did you ever pose the question for Terry Hart?

A Terry Hart was basically following in what — whatever statements Archie Murrietta made.

Q Did you ever ask Mr. Hart --

A He didn't know.

Q — whether it survived?

A He didn't know why it didn't survived, but he didn't want to get into an argument or discussion with

Murrietta regarding the survivability of the contract.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROD McKINNEY; and CF AIR FREIGHT EMPLOYEES, Plaintiffs,	)	Case No. C94-1608 CAL (ARB)
vs.	)	
EMERY AIR FREIGHT CORP., d/b/a EMERY WORLDWIDE, a CF COMPANY; LOCAL 85, IBT, WESTERN CONFERENCE OF TEAMSTERS; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, Defendants.	)	

DEPOSITION OF THOMAS J. LaGRAVE
TUESDAY, JULY 11, 1995

C & H COURT REPORTERS
116 MERION TERRACE
MORAGA, CALIFORNIA 94556
I.D. No. 68-0290999
(510) 376-6770 (800-254-9991)
FAX (510) 376-6771 PAGER (800) 408-0754

***

Page 18, line 20 - page 19, line 4

Q What do you recall, as close as you can, and I realize you are going to have difficulty remembering his exact words perhaps, but as close as you can recall, what did Mr. Murrietta say during the course of the time that he was there?

A Mr. Murrietta's statement was: "The merger is in the process of going through. We will go according to deniority, and if you're not happy with this or happy with my dealings, I suggest that you get yourself a good lawyer."

***

Page 87, line 20 - page 88, line 4:

Q After you had your conversation with Mr. McKinney, where you were going to try and get more information about it, what did you do?

A I went to Pete Rodriguez.

Q Who is Pete Rodriguez?

A He was — at that time was the business agent for 856.

Q Why did you go to Mr. Rodriguez?

A Because I knew that he attends the JWAC meetings.

***

Page 88, line 11 - 19:

Q How long before contacting Mr. Rodriguez had you heard this rumor that you hearing was --

A Into the end of that week, like Friday. That's why I went to his house on Saturday.

Q You hadn't heard about it until Friday?

A Well, I knew JWAC was being held. Everybody knows that. That's the common law of the Teamsters, when they are being held. But as far as who is on the cases we have — I have no idea.

***

Page 93, line 3 - page 95, line 11:

Q When did you speak with Mr. Rodriguez?

A I spoke to him on a Saturday. Saturday afternoon, about noontime.

Q What did you ask him to do or ask him?

A I went to his home, and I said, "Are you going to the hearings in San Diego?"

And he says, "Yeah," 856, he's a business agent — steward, excuse me. A business agent, excuse me.

I says, "Do you have an agenda?"

He says, "Yeah, they give us an agenda before we leave."

He had the agenda, and I said, "Could you look and see if we are on the agenda?" and he opened his paper ting there, and he says, "There's nothing there under Emery or Rod McKinney," and I said, "Okay. Thank you."

Q Did you look to see if there was anything for CF?

A Yeah. All three. There was nothing for CF Air or Rod McKinney.

Q Did you personally look through the agenda?

A. No. Personally, that's like me trying to look through your stuff, so I took him at his word. I mean he's reading out of the book.

So then we continued on and had a coke, you know, and just chitchat. He said, "I'm leaving Sunday morning," or "Sunday at noon." They have a — what they call a write-in a lot of times for hearings. He says, "I'll get down and when we get this add-on," or write-in, whatever they call it, "if you're on there I'll phone you," and he say, "You can come down."

You know, so he called me and in the meantime I called Roy Re, and I said, "Pete's going to call me. If there is going to be hearing, do you want to go?

He said, "Definitely. We'll jump on a plane and go."

So he called me Sunday evening, and said, "There is no write-on," or "Write-in." He says, "You are not on it."

I says "Okay. Thanks for it," you know, and that was it. I came home Monday evening from the hearing and on my machine there was --

Q From the hearing?

A From work, rather. Excuse me. I cam home Monday evening from work, and on my machine was a message. All it said was, "Tom, you lost. They had the hearing this morning at 9:00."

Q Who was the message from?

A Pete Rodriguez. I says — now, I'm sitting here at 8:00 at night, and I go, "Well, I guess that takes care of that,: because I don't know the ins and outs again.

So in the meantime I contacted Roy Re and said, "Pete called and said we lost." I said, "They had the hearing and we weren't there," but the company was there, and Terry Hart represented us.

11:25 A.M. November 8, 1993 11-93-4668

LOCAL 85
and
EMERY WORLDWIDE

CALIFORNIA TRUCKING ASSOCIATION COMMITTEE
ARCHIE MURRIETTA, CHAIRMAN
BEN PLOSHAY, CO-CHAIRMAN

UNION PANEL:	EMPLOYER PANEL:
RAY BURKHART	GORDON KIRBY
JIM GOODWIN	BEN PLOSHAY

APPEARING FOR THE UNION: TERRY HART
APPEARING FOR THE COMPANY: JAMES LA SCALA

Page 27, lines 1-12

THE CHAIRMAN: Next case is 11-93-4668, Local 85 and Emery Worldwide.

The Union Panel will be Burkhart and Goodwin

MR. PLOSHAY: The Employer Panel will be Kirby and Ploshay.

THE CHAIRMAN: Appearing for the local union?

MR. HART: Terry Hart.

THE CHAIRMAN: Appearing for the company?

MR. LA SCALA: James La Scala.

THE CHAIRMAN: Local, you are the moving party, go ahead.

***

Page 39, line 14 - page 40, line 4

THE CHAIRMAN: Questions by the panel?

(No response)

Hearing none, executive session. Parties be excused.

(Executive session)

THE CHAIRMAN: We have a decision.

THE REPORTER: "I move, Mr. Chairman, that the Local 85 contract did not follow the former CF Air Freight employees to the Emery terminals when they were integrated into the Emery work force, that it did not continue to control their working conditions at the Emery terminals, and that it had no continuing effect after the work force consolidation.

"The motion was seconded and carried.

"The fee of $200 to the union."

BEESON, TAYER & BODINE
Attorneys at Law
A Professional Corporation
235 Pine Street, Suite 1200
San Francisco, California 94101-2701
(415) 986-4060
FAX (415) 986-8149
December 8, 1992

Christopher W. Katzenbach, Esq.
Mills Building - Penthouse One
200 Montgomery Street
San Francisco, California 94104

RE: Rod McKinney et al. v. Emery
Air Freight and Local 85

Dear Mr. Katzenbach:

I have asked Teamsters Local 85 to defer submitting the dispute between the parties to the grievance panel until you let us know whether the Plaintiffs wish to file a new grievance. In order to move this case along I think we should have it scheduled for the first meeting of the Panel after the New year. I personally have no preference inthis matter but you will recall in a recent telephone conversation that I told you the Union would have no objection if you would like to update the issue by filing a new grievance that would conform generlaly with the decision of the Ninth Circuit Court of Appeals.

Please let me hear from you so that the case can be placed on the Agenda for the next meeting of the Panel.

Very truly yours,
(s)
Duane B. Beeson

DBB: kmh
cc: John Guest

LAW OFFICES OF
CHRISTOPHER WOLCOTT KATZENBACH
MILLS BUILDING - PENTHOUSE ONE
220 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94101
TELEPHONE (415) 391-6464
FAX (415) 391-2696
December 18, 1992

Duane B. Beeson, Esq.
Beeson, Tayer & Bodine
235 Pine Street, Ste. 1200
San Francisco, CA 94101-2701

Re: McKinney v. Emery Air Freight

Dear Mr. Beeson:

I am responding to your letter of December 8, 1992.

When we last spoke about this case, you were poing to contact the union to determine what its position was on this case and advise me accordingly. I have not heard back from you as to the union's position.

Before attempting to redraft the grievances, if necessary, I would like to know the union's position. That way, I can redraft the grievances to accommodate what the union feels are the issues and appropriate remedies, should that appear in my clients' best interests.

I do not think that the grievance need conform specifically to the matters discussed by the Ninth Circuit, since the panel can take those matters into account in any event based on the Court's written decision.

Very truly yours,
(s)
Christopher W. Katzenbach

LAW OFFICES OF
CHRISTOPHER WOLCOTT KATZENBACH
MILLS BUILDING - PENTHOUSE ONE
220 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94101
TELEPHONE (415) 391-6464
FAX (415) 391-2696

May 5, 1993

Duane B. Beeson, Esq.
Beeson, Tayer & Bodine
235 Pine Street, Ste. 1200
San Francisco, CA 94101-2701

Re: McKinney v. Emery Air Freight

Dear Mr. Beeson:

I have not heard from you or the Union with respect to the Union's position in this dispute. As I have explained, the lack of response from the Union makes it difficult to determine which issues my clients should be pursuing and which issues are in dispute in this matter.

Nevertheless, let me briefly state some of the issues which I believe are to be resolved by arbitration.

First, was the 1988-1991 contract signed only for the purpose of confirming a retroactive pay increase or did it remain in effect after the consolidation of Emery and CF? Since the Union negotiated this agreement, the Union's position on this factual issue is critical to the proceedings before any of the Teamster Joint Boards. Obviously, we need to know if the

Union intends to support the Company's "limited purpose" argument or not.

Second, if the 1988-1991 contract was not limited to the retroactive pay issue asserted by the company, it is apparent to us that the company violated the contract in at least the following ways:

a. The bidding for terminals was not posted and not by seniority (Art. 34, secs. 2, 8 and 9; see Art. 6, sec. 2)

b. The CF work was transferred to new terminals and given, in whole or part, to Emery employees. This violated the work preservation provisions of the agreement (Art. 2, secs. 1 and 2; Art. 27, secs. 1 and 2; Art. 38, sec. 1)

c. The CF employees were subjected to inferior working conditions under the Emery contract than those contained in the 1988-1991 contract.

d. Loss of seniority rights for the CF drivers.

Third, should the panel find that the 1988-1991 contract was violated, the precise scope of remedy should include, at a minimum, restoration of all benefits lost, compensation for additional expenses in commuting to new terminals, and back pay lost because the former CF work was transferred to the old Emery employees. I think, in particular, that it is important to recognize that the transfer of work issue is independent of the seniority issue. The 1988-1991 contract protects the CF drivers' work from being transferred to other employees, regardless of the other employees' seniority in the merged

company. So long as work can be traced as CF work, it belongs to the CF drivers and no one else.

I would expect, however, that the remedy issues would be resolved separately from the general issue of liability. In other words, the panel would first decide liability and then, in a later proceeding if liability is found, decide the specific damages whic are owed.

Fourth, as to the seniority issues, there are two matters to resolve. (1) Since old Emery was benkrupt, we believe that the standard rule under Teamster contracts is to entail the Emery employees; that rule should be applied here also. (2) Since CF was the surviving corporation, it is seniority with CF that counts for purposes of seniority rights in the new company; the Emery employees are, in effect, new hires into CF. In our view, giving the old Emery employees a seniority date based on service with Emery is, in effect, giving them super-seniority over the CF employees' and using seniority as a subterfuge to give the CF employees' work to the old Emery employees. I doubt very much that the Union would have allowed this if the old Emery employees had been non-union.

Very truly yours,
(s)
Christopher W. Katzenbach

BEESON, TAYER & BODINE
Attorneys at Law
A Professional Corporation
235 Pine Street, Suite 1200
San Francisco, California 94101-2701
(415) 986-4060
FAX (415) 986-8149

July 28, 1993

Christopher W. Katzenbach, Esq.
Katzenbach & Khtikian
1714 Stockton Street, Ste. 300
San Francisco, California 94133-2930

RE: McKinney. v. Emery Air Freight

Dear Mr. Katzenbach:

I am informed that Teamsters Local 85 has requested the above case to be scheduled for the Joint Western Area Committee's (JWAC) meeting in August, 1993. The purpose of the hearing will be to take evidence and resolve the question identified by the Ninth Circuit's decision as appropriate for handling under thearbitration provisions of the collective argaining agreement. As you are aware, Judge Legge upon remand of the case by the Ninth Circuit has ruled that the Ninth Circuit's order contemplates submission of the case pursuant to the pre-arbitration step of the grievance procedure.

In view of the history of the positions taken by the parties at various stages of this proceeding, Local 85 does not believe it appropriate to be the spokesperson at JWAC for Mr. McKinney and the group he represents. A representative of

Local 85 will attend the hearing and will take appropriate steps to ensure that Mr. McKinney and/or other members he represents will have a full opportunity to present their case. It is my understanding that under the rules of JWAC attorneys are not permitted to appear at hearings to represent parties to the case. A Teamster member who is involved in the proceedings may represent himself, or have representation through another Teamster member.

Scheduling of this case is being handled by Archie Murrietta of the Western Conference of Teamsters. Mr. Murrietta's address 1616 West Ninth Street, Los Angeles, Calif. and his telephone number is (213) 365-4780. He should be able to furnish you with additional details concerning the time and place of the hearing. Although I assume you will be in communication with Mr. McKinney, I believe Terry Hart of Local 85 will also communicate with him about the hearing.

Very truly yours,
(s)
Duane B. Beeson

DBB: kmh
cc: Archie Murrietta/WCT
Terry Hart/Local 85

BEESON, TAYER & BODINE
Attorneys at Law
A Professional Corporation
235 Pine Street, Suite 1200
San Francisco, California 94101-2701
(415) 986-4060
FAX (415) 986-8149

November 2, 1993

FAX/MAIL

Christopher W. Katzenbach, Esq.
Katzenbach & Khtikian
1714 Stockton Street, Ste. 300
San Francisco, California 94133-2930

RE: McKinney. v. Emery Air Freight

Dear Mr. Katzenbach:

I have learned that the above case is scheduled for the November meeting of the Joint Western Area Committee (JWAC). My letter of July 28, 1993, copy of which I am enclosing for your convenience, states the position of Local 85 in respect to the handling of his matter.

I am not sure that Local 85 has been ablve to communicate with all of the Plaintiffs represented by you in the Court case, any by this letter I am requesting that you communicate with one or more of them so that the representation of your clients will be effectively presented.

Scheduling of this case is handled by Archie Murrietta of the Western Conference of Teamsters, whose address is 1616 West 9th Street, Los Angeles, Calif. (Tel: (213) 365-4780). Mr. Murrietta should be able to answer any questions you have about procedures.

Very truly yours,
(s)
Duane B. Beeson

DBB: kmh
cc Terry Hart
Archie Murrietta
Enc.

1/11/89

AGREEMENT BETWEEN CF AIR FREIGHT, INC. AND TEAMSTER LOCAL 85

April 1, 1988 through March 31, 1991

THIS AGREEMENT is made and entered into this 1st day of April, 1988, by and between CF AIRFREIGHT, INC. Hereinafter referred to as the "Company" or the "Employer," and BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL 85, hereinafter referred to as the "Union.," and constitutes the sole agreement between the parties.

ARTICLE I.

SCOPE

***

Section 3. Transfer of Company Title or Interest

The Employer's obligations under this Agreement shall be binding upon its successors, administrators, executors and assigns. The Employer agrees that the obligations of this Agreement shall be included in the agreement of sale, transfer or assignment of the business. In the event an entire operation, or a portion thereof, or rights only, are sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation or use of rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof. Transactions covered by this

provision include stock sales or exchanges, mergers, consolidations, spin-offs or any other method by which a business is transferred.

It is understood by this section that the Employer shall not sell, lease or transfer such run or runs or rights to a third party to evade this agreement. In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer shall be liable to the Local Union and to the employees covered for all damages sustained as a result of such failure to require the assumption of the terms of this Agreement until its expiration date, but shall not be liable after the purchaser, the transferee or lessee has agreed to assume the obligations of this Agreement. The obligations set forth above shall not apoply in the event of the sale, lease or transfer of a portion of the rights comprising less than all of the Employer's rights to another company unless the purpose is to evade this agreement. Corporate reorganizations by the Employer, occurring during the term of this Agreement, shall not relieve the Employer or the reorganized employer of the obligations of this Agreement during its term.

The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, or other entity involved in the sale, merger, consolidation, acquisition, transfer, spin-off, lease or other transaction by which the operation covered by this Agreement or any part thereof, including rights only, may be transferred. Such notice shall be in writing with a copy to the Local Union, at the time the seller, transferror, or lessor makes the purchase and sale negotiation known to the public or executes a contract or transaction as herein described, whichever first occurs. The Local Union shall also be advised of the exact nature of the transaction, not including financial details.

The term rights shall include routes and runs.

***

Teamster Local 85	CF Air Freight, Inc.
By: (s)_____	By: (s)_____
Date: _____	Date: 5/15/89

Ratified April 10, 1989

Supreme Court, U.S.
FILED
AUG 20 1997
CLERK

(2)

No. 97-128

In The

Supreme Court of the United States

October Term, 1996

ROD McKINNEY and CF AIR FREIGHT EMPLOYEES,

Petitioners,

vs.

EMERY AIR FREIGHT CORPORATION d/b/a EMERY WORLDWIDE, A CF COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM J. EMANUEL
Counsel of Record
JOHN S. BATTENFELD
MORGAN, LEWIS & BOCKIUS LLP
801 South Grand Avenue
Suite 220
Los Angeles, CA 90017-4615
(213) 612-2500

Attorneys for Respondent
Emery Air Freight Corporation

71826
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

14 pp

QUESTION PRESENTED

Should this Court grant certiorari to review the Ninth Circuit's unpublished decision that Petitioners' duty of fair representation claims were either time-barred or without merit, when there is no conflict among federal courts on the issues decided, and the Ninth Circuit applied well-settled legal principles to a unique set of facts?

LIST OF PARTIES

1. Petitioner Rod McKinney.

2. Petitioner CF Air Freight Employees.

3. Respondent Emery Air Freight Corporation. Respondent's parent company is CNF Transportation Inc. Respondent's nonwholly owned subsidiaries are Emery Worldwide (India) Private Limited and Emery Transnational Air Cargo Corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	5
I. This Case Does Not Present Issues Warranting The Grant Of Certiorari.	5
A. The Court of Appeals' Unpublished Decision Does Not Create Any Conflict Among the Circuits.	6
B. The Ninth Circuit Applied Established Legal Principles to Petitioners' Factbound Claim.	7
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Buttry v. General Signal Corp., 68 F.3d 1488 (2d Cir. 1995)	4, 8

Contents

	Page
Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees, 831 F.2d 429 (3rd Cir. 1987)	6, 7
Cox v. Administrator United States Steel and Carnegie, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995)	7
Dowty v. Pioneer Rural Electric Cooperative, Inc., 770 F.2d 52 (6th Cir.), *cert. denied*, 106 S. Ct. 572 (1985)	6
Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986)	4, 6, 7
Ghartey v. St. John's Queens Hospital, 869 F.2d 160 (2d Cir. 1989)	6
Kozy v. Wings West Airlines, Inc., 89 F.3d 635 (9th Cir. 1996)	4, 6
Lucas v. Mountain States Telephone and Telegraph, 909 F.2d 419 (10th Cir. 1990)	6
McKinney v. Emery Air Freight Corporation, 954 F.2d 590 (9th Cir. 1992)	1
Vadino v. A. Valey Engineers, 903 F.2d 253 (3rd Cir. 1990)	7
Rule Cited:	
Ninth Circuit Rule 36-3	5

STATEMENT OF THE CASE

The long and complicated factual background to this case is summarized in the unpublished opinions of the Ninth Circuit and the District Court below, as well as the Ninth Circuit's earlier decision in *McKinney v. Emery Air Freight Corporation*, 954 F.2d 590 (9th Cir. 1992) ("*McKinney I*"). In *McKinney I*, Petitioners brought an action against Respondent Emery Air Freight Corporation ("Emery") for declaratory relief concerning the status of a collective bargaining agreement following a corporate merger and work force consolidation involving CF Air Freight, Inc. ("CFAF") and Emery. After the merger and consolidation, the former CFAF employees became Emery employees, working at Emery terminals in a bargaining unit governed by a collective bargaining agreement between Emery and three Teamster locals. In *McKinney I*, Petitioners sought a declaratory judgment that they continued to have rights under the collective bargaining agreement which had governed their employment by CFAF. The Ninth Circuit held that the question of whether the CFAF agreement "remained in effect after the consolidation of the work forces" was required to be resolved through arbitration. On remand, the District Court ordered that the dispute be resolved through the Joint Western Area Committee ("JWAC") grievance procedures contained in the agreement.

During proceedings in *McKinney I*, Petitioners' union, Local 85, had taken the position that the former CFAF employees became part of the Emery bargaining unit after the merger, and were therefore covered by the collective bargaining agreement between Emery and the Teamster locals, rather than the agreement which covered the former CFAF bargaining unit. After the Ninth Circuit and District Court ordered arbitration, Local 85 informed Petitioners' attorney that "[i]n view of the history of the positions taken by the parties at various stages of

this proceeding, Local 85 does not believe it appropriate to be the spokesperson at JWAC for Mr. McKinney and the group he represents. A representative of Local 85 will attend the hearing and will take appropriate steps to insure that Mr. McKinney and/or other members he represents will have a full opportunity to present their case." The District Court found that this "was an unequivocal statement by the union's counsel that the union would *not* represent the plaintiffs at the JWAC hearing, but would do no more than procedurally keep the proceedings open for plaintiffs to present their own case." Petitioners' Appendix ("App.") p. 7a. Local 85 also sent written communications to Petitioners advising them of the dates of the hearing and whom to contact for further information.

At the first JWAC hearing, scheduled for August 1993, the hearing was postponed because no one appeared on behalf of Petitioners, and the hearing was continued until November 1993. Local 85's counsel advised Petitioners' counsel of the November hearing and the person to contact for further information. However, neither Petitioners nor their counsel responded to this communication, and no representative of Petitioners contacted the appropriate person for further information about the hearing. At the JWAC hearing on November 8, 1993, no one appeared on behalf of Petitioners. After a presentation made by Emery, the JWAC, which consisted of a four member panel, issued a decision finding that:

> [T]he Local 85 contract did not follow the former CF Air Freight employees to the Emery terminals when they were integrated into the Emery work force, that it did not continue to control their working conditions at the Emery terminals, and that it had no continuing effect after the work force consolidation.

App. p. 48a. Archie Murrietta was not a member of the panel which decided the case and he did not vote on the case. App. p. 32a.

In granting summary judgment in favor of Emery in an unpublished opinion, the District Court determined that "the whole issue in this dispute is whether the union improperly declined to represent plaintiffs at the hearing at all." App. p. 5a. The District Court reviewed the undisputed facts to determine when Petitioners knew or should have known that Local 85 would not represent them at the JWAC hearing. The District Court concluded that Petitioners knew this no later than July 28, 1993, when their counsel received the letter from Local 85's counsel. Because Petitioners did not file their action until May 1994, the District Court concluded that the action was filed outside of the six month statute of limitations. The District Court also found no basis for a tolling of the statute of limitations or for equitable estoppel:

> Plaintiffs simply took no action in response to the union's communications. Plaintiffs made no attempt to use the grievance hearing in good faith, and really did nothing at all. The union did not mishandle the grievance hearing on November 8. Indeed, it did what it said it would do — see that the procedures were open for plaintiffs to make their own presentation.

App. p. 8a.

The Ninth Circuit affirmed the District Court's summary judgment ruling in an unpublished memorandum opinion. The Court rejected Petitioners' contention that Ninth Circuit case law established a "bright line rule" that a duty of fair

representation claim does not accrue until the plaintiffs learn the result of the arbitration proceeding. The Court noted that under *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986), where the union decides not to pursue a grievance, the cause of action accrues "when the employee learns or should have learned of the union's decision." The Court distinguished another Ninth Circuit decision, *Kozy v. Wings West Airlines, Inc.*, 89 F.3d 635 (9th Cir. 1996), which involved a union's allegedly flawed representation at an arbitration hearing, rather than a failure to represent at all. The Ninth Circuit held that the District Court correctly relied on the Second Circuit's decision in *Buttry v. General Signal Corp.*, 68 F.3d 1488 (2d Cir. 1995), and that Ninth Circuit law was not inconsistent with *Buttry*.

The Ninth Circuit also addressed the merits of Petitioners' claim that Local 85 breached its duty of fair representation by failing to give them adequate notice of the grievance hearing, and with respect to the role played by Archie Murrietta in the conduct of the grievance proceeding. With respect to the former issue, the Ninth Circuit held:

> Here again we agree with the district court that the appellants received ample notice in the July and November letters. The letters told the appellants that their grievance would be considered at the upcoming meetings, and instructed them to call for precise details. They never did, and have offered no explanation for their failure to do so.

App. p. 11a. With respect to the Murrietta issue, the Ninth Circuit concluded:

> The record shows, however, that despite receiving notice, appellants never appeared

> at the hearing and did nothing to protect their interests there. We agree with the district court that appellants did "nothing at all" to avail themselves of the grievance process. They should not now be heard to complain about the manner in which it was conducted.

App. p. 11a. The Ninth Circuit panel subsequently voted to deny Petitioners' petition for rehearing and to reject the suggestion for rehearing en banc. No judge of the full Court requested a vote on the suggestion for rehearing en banc. App. p. 12a.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT ISSUES WARRANTING THE GRANT OF CERTIORARI.

The petition presents no special or important reason to support the exercise of this Court's certiorari jurisdiction. Contrary to Petitioners' claims, the Ninth Circuit's unpublished decision creates no conflict with any other Court of Appeals decision.[1] Petitioners' attempt to manufacture such a conflict is based on two cases. In fact, each of these cases is consistent with the Ninth Circuit's decision in this case. In addition, the Ninth Circuit's decision does not present an important question of federal law, but rather presents a fact-specific application of firmly-established legal principles. At most, Petitioners challenge the Ninth Circuit's application of settled legal principles to the undisputed facts of this case. This issue does not warrant grant of the petition.

---

1. Even if the Ninth Circuit's decision did conflict with the law of other circuits (which it does not), the unpublished decision cannot create a conflict because it is not regarded as precedent and cannot be cited in other cases. *See* Ninth Circuit Rule 36-3.

A. The Court of Appeals' Unpublished Decision Does Not Create Any Conflict Among the Circuits.

Petitioners erroneously contend that the "Circuits are split on whether the limitations period starts to run when the grievance-and-arbitration process is concluded (the 'date of exhaustion' test) or when the employee knows or should know of the facts indicating a breach of the union's duty of fair representation in the handling of the grievance or arbitration, even if that is before any formal decision on the employee's grievance (the 'knows or should have known' test)." Petition p. 11. As the Ninth Circuit noted in rejecting Petitioners' appeal, the relevant case law "establishes no such bright line rule." App. p. 10a. Rather, when the alleged breach of the duty of fair representation involves a union's decision not to pursue a grievance, the cause of action accrues — and the statue of limitations begins to run — "when the employee learns or should have learned of the union's decision." *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986). It is only "where a duty of representation suit seeks to overturn an unfavorable arbitration award on the ground that the union committed errors in the arbitration proceedings," that "the claim accrues when the employee learns of the arbitrator's award." *Id.* The latter accrual rule has been applied in cases where the union actively represented the employee at the grievance hearing. *See Kozy v. Wings West Airlines, Inc.*, 89 F.3d 635 (9th Cir. 1996); *Ghartey v. St. John's Queens Hospital*, 869 F.2d 160, 165 (2d Cir. 1989); *Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees*, 831 F.2d 429, 435-436 (3rd Cir. 1987); *Dowty v. Pioneer Rural Electric Cooperative, Inc.*, 770 F.2d 52, 56-57 (6th Cir.), *cert. denied*, 106 S. Ct. 572 (1985); *Lucas v. Mountain States Telephone and Telegraph*, 909 F.2d 419, 420-421 (10th Cir. 1990).

Contrary to Petitioners' assertion, all of the Circuits,

including the Third and the Eleventh Circuit, have used the equivalent of a "knows or should have known test" in determining the accrual of duty of fair representation claims. *See Vadino v. A. Valey Engineers*, 903 F.2d 253, 260 (3rd Cir. 1990) (six-month period commences " 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.' " (citations omitted); *Cox v. Administrator United States Steel and Carnegie*, 17 F.3d 1386, 1412 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995) (" 'Generally, a cause of action accrues under § 301, and the statute of limitations begins to run, when in the exercise of reasonable diligence the claimant knew or should have known of the injury.' ") (citations omitted). Indeed, the case which Petitioners claim is "the leading case" for establishing a rule which conflicts with the Ninth Circuit's rule, *Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees*, based its analysis of the accrual issue on the Ninth Circuit's decision in *Galindo v. Stoody Co. See Childs*, 831 F.2d at 434.

B. The Ninth Circuit Applied Established Legal Principles to Petitioners' Factbound Claim.

In the present case the Ninth Circuit applied established principles of law to a unique factual situation. The union unequivocally informed Petitioners that it would not represent them at the JWAC hearing, but would allow Petitioners to present their grievance to the JWAC on their own. The union notified Petitioners that their grievance would be considered at upcoming JWAC proceedings, and instructed them to call a specified person for further information about the hearing. However, Petitioners never followed these instructions, and offered no explanation for their failure to do so. When Petitioners failed to appear for the scheduled JWAC hearing in August 1993, the hearing was postponed. When Petitioners again failed to appear for the

rescheduled JWAC hearing in November 1993, the JWAC proceeded to hear the case and rendered its decision in favor of Emery and against Petitioners.

In evaluating these extremely unique facts, both the District Court and the Ninth Circuit concluded that the case was most analogous to the decision in *Buttry v. General Signal Corp.*, 68 F.3d 1488 (2d Cir. 1995). In *Buttry*, the Second Circuit held that where the union gives advance notice that it will not advocate the employee's position at the arbitration hearing and, consistent with that position, does not actively represent the employee's interest in the arbitration proceeding, the employee's duty of fair representation claim accrues when he is informed of the union's position, not when the employee learns of the arbitrator's award. 68 F.3d at 1492-1493. The Ninth Circuit agreed with the District Court that to the extent Petitioners' claim was based on the theory that the union breached its duty by refusing to represent them at the JWAC hearing, this claim was time-barred because Petitioners received notice that the union would not represent them more than six months before the complaint was filed. The Ninth Circuit also considered and rejected the merits of Petitioners' claim that the union breached its duty of fair representation by failing to give them adequate notice of the grievance hearing, and by allowing Archie Murrietta to play a role in the November grievance proceeding. The Ninth Circuit agreed with the District Court that Petitioners received ample notice of the grievance hearing both in July and in November 1993. The Ninth Circuit also agreed with the District Court that because Petitioners never appeared at the hearing and did nothing to protect their interests there, "[t]hey should not now be heard to complain about the manner in which it was conducted."

Therefore, the Ninth Circuit's decision does not present an important question of federal law yet to be decided by this Court, nor does it conflict with any decision of this Court or with

opinions of the lower federal courts. The Ninth Circuit's decision merely presents a fact-specific application of well-established general principles concerning the accrual and merits of duty of fair representation claims. Indeed, the facts of this case are so unique that it is likely the issues decided by the Ninth Circuit will rarely, if ever, arise in the future. The case does not raise any important legal issues for the Supreme Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. EMANUEL
Counsel of Record
JOHN S. BATTENFELD
MORGAN, LEWIS
& BOCKIUS LLP
801 South Grand Avenue
Suite 220
Los Angeles, CA 90017-4615
(213) 612-2500

Attorneys for Respondent
Emery Air Freight Corporation